CIVIL LITIGATION, PROBATE AND BANKRUPTCY PROCEDURES: A DIPLOMATIC EXAMINATION OF BRITISH COLUMBIA SUPREME COURT RECORDS

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ABSTRACT

For centuries, the theory and principles of diplomatics have played a role in the work of European archivists. In North America, however, its relevance is still under scrutiny. This thesis employs diplomatic analysis to test its validity when applied to modern documents and procedures.

To investigate the significance of diplomatic methodology and analysis, this thesis first discusses the recent history and structure of the British Columbia court system. It then examines a selection of case files from the civil, probate and bankruptcy registries, and it assigns the documents within to one of the six phases of a procedure: initiative, inquiry, consultation, deliberation, deliberation control, and execution.

The study concludes by discussing the diplomatic character of the procedures and its importance in the understanding of modern records. More specifically, it outlines how diplomatics and procedural analysis can assist records professionals in the development of classification systems and retention and disposition schedules; the design of automated records management systems; and archival appraisal, arrangement and description.

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INTRODUCTION

The court system in British Columbia has undergone some profound changes over the past several decades as the result of innovations in office technology and escalating demands on the system. The Ministry of the Attorney General reported 42,849 new Supreme Court civil actions begun in the fiscal year of 1988/1989 as compared to 15,734 in the calendar year of 1974. In 1968, there were approximately 1,400 lawyers registered in British Columbia. Electronic typewriters had been recently introduced into law offices as had the first photocopy machines. As the Law Society of British Columbia reports, "[d]ocuments were few and far between and never bound, tabbed nor indexed, with sets for the judge, all counsel and one for the witness."[1] On average, lawsuit trials were completed in one day. By 1988, however, the word processor or micro-computer, and the facsimile machine were essential operating components in any law office; the British Columbia Law Society now had over 6,000 members, and a "five day trial ...[was] the norm."[2] Accordingly, the court system is faced with a vast increase in the number of documents to be processed and lengthy delays between the issuing of a writ and the trial.[3]

The government and the legal community have responded to these and other developments by issuing a wide array of studies, reforms, and legislation aimed at every aspect

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[1]Law Society of British Columbia, "Submission to the Justice Reform Committee in the Matter of Civil Procedure," [Vancouver], 1988, 2.

[2]Law Society of British Columbia, 3.

[3]Lorna K. Rees-Potter, Communicating Court Information: Towards a Canadian Court Records Handling System, (Ottawa: Canadian Law Information Council, 1984), iii.

of the court system, from the implementation of more efficient court procedures to the restructuring of the courts. Between 1973 and 1976, a special committee drafted streamlined and more efficient Rules of the Supreme Court, which were then instituted in 1977. In 1974 and 1975, the Court Services Branch of the Ministry of the Attorney General underwent a series of reoganizations, while the ministry assumed control of 44 municipal courts from as many municipalities, and 36 Supreme and County Court Registries from the Department of Finance.[4]

Throughout 1988, further reforms to the system were studied under the auspices of the Justice Reform Committee. The Committee examined several aspects of the administration of justice in the province and identified the need for plain language in court and legal documents, for a simplification of family law, for the application of information technology, and for the improvement of case management in the courts. Its recommendations included the merging of the Supreme and County Courts jurisdictions, and further amendments to the Rules of Court to facilitate efficient and rapid case management.[5] The administration of court services is highly dependant on the efficient management of the registries that receive and maintain the documents which both propel and are the result of legal actions. More importantly, the common law system, which is based on legal precedent, is dependant on a thorough record of proceedings. In addition, the value of court documents extends beyond the immediate needs of the conduct of the case or future legal decisions. Many types of disciplines, and of scholars, such as legal and social historians consider court registry documents essential as sources for a great number

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[4]British Columbia, Ministry of the Attorney General, Justice '75 Review: A Progress Report from the Attorney-Generals's Office, (Victoria, 1975), 4.

[5]British Columbia, Ministry of the Attorney General, Annual Report, 1989-1990.

of studies.

To meet the demands of both current and future use and management of court records, archivists and records managers must acquire a comprehensive knowledge of the court registry system. In order to do so, it is necessary to understand just how specific registries function, and then identify the essential characteristics they all have in common.

This thesis will examine the records of the Civil and Probate/Bankruptcy registries of the Vancouver Law Courts Region of the Supreme Court of British Columbia. The Supreme Court of British Columbia is the highest trial court in the province. As with its predecessors, County Courts, the Chief Justice, Associate Chief Justice and 52 Puisne Judges of the Supreme Court are federally appointed, while jurisdiction, organization and administration of the court remain the responsibility of the provincial government. Being the highest trial court in the province, its jurisdiction includes all criminal trials which the Criminal Code of Canada specifies must be tried by a superior court of criminal jurisdiction. The Supreme Court's jurisdiction in civil cases is relatively wide-ranging, and includes divorce, adoption matters, bankruptcy claims, libel cases, and litigation involving amounts of more than $50,000. In addition, the Supreme Court of British Columbia hears appeals from the Provincial Court. The Court's territorial jurisdiction focuses on, but is not limited to, those civil cases which arise within the Province.

The structure of the court system in Canada and each of the provinces is hierarchical, with the Supreme Court of Canada acting as the country's highest court of appeal. Prior to 1949, appeals could be made to the Judicial Committee of the Privy Council in England. British Columbia's Court of Appeal was established in 1909, and hears civil cases appealed from the British Columbia Supreme Court, and criminal cases appealed from Provincial and Supreme trial

courts.

The British Columbia Provincial Court was established in 1969 and it tries the lesser criminal offences, family matters and small claims. Following a pattern similar throughout the territories and provinces of Canada, the operation of this level of court is within the complete domain of the province and its judges are provincially appointed. From their creation in 1859, and until their jurisdiction was merged with that of the Supreme Court of British Columbia in 1990, the County Courts of British Columbia were the equivalent of other provinces' district courts. Their jurisdiction included more serious criminal cases, and civil cases involving amounts ranging between $2,000 and $50,000. In 1985, there were 40 County Court justices in British Columbia, each appointed by the federal government, sitting in the seven judicial districts of Vancouver, Cariboo, Kootenay, New Westminster, Prince Rupert, Vancouver Island and Yale. With the implementation of the amended Rules of Court in 1990, the Judicial District of Vancouver Island was split into the two districts of Victoria and Nanaimo.[6]

The civil registries of the Supreme Court relate to matters of private law, that is, to "those areas of the law in which the private interest is primarily involved," as opposed to matters of public law, that is "those areas of the law in which the public interest is primarily involved."[7] While public law includes the areas of taxation, constitutional, administrative and criminal law,

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[6]Information on the history, structure and jurisdiction of the courts of British Columbia can be found in Judith Blackwell, The Courtwatcher's Manual, (Vancouver: Legal Services Society of Britich Columbia, 1985); Perry Millar and Carl Barr, Judicial Adninistration in Canada, (Kingston and Montreal: McGill-Queen's University Press, 1981); Statistics Canada, Canadian Centre for Justice Statistics, Profile of Courts in Canada, 1987-1988, (Ottawa, 1989).

[7]Gerald L. Gall, The Canadian Legal System, 3rd edition, (Toronto: Carswell, 1990), 24, 25.

private law encompasses contracts, wills and trusts, family law, real estate, agency, patents, company, torts and property.[8]

Civil proceedings are initiated in response to an issue of substantive law, or a "law which gives or defines" rights.[9] The manner in which the proceeding is conducted, or "the formal steps in an action or other judicial proceeding" is the legal procedure, and is regulated by procedural law.[10] Procedural law influences the structure of a civil case file because it determines series of actions and related documents. The Rules of Court, along with specific statutes, are the mechanisms which control the procedures of the court. As noted by Peter Fraser and John Horn, "[t]he Rules of Court are the servants and not the masters of the Court and the duty of the Court is to interpret them so as to do justice between the parties."[11]

As mentioned earlier, on February 1, 1977, after five years of special reports and commissions, British Columbia's completely reworked Rules of Court came into force. Civil court procedure in British Columbia had had its first system of rules in 1857 with Rules and Manner of Proceedings of the Supreme Court of Civil Justice for Vancouver's Island. Subsequent bodies of civil procedural rules in the United Colony of British Columbia were modelled on English rules, and incorporated similar reforms of the English Judicature Acts of the late nineteenth century. In 1976, Peter Fraser, referring to the efforts of the committee to

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[8]Gall, 27.

[9]Henry Campbell Black, Black's Law Dictionary, revised 4th ed. by the publisher's editiorial staff, (St. Paul, Minn.: West Publishing Co., 1968), 1367.

[10]Black, 1367.

[11]Peter G. Fraser and John W. Horn, The Conduct of Civil Litigation in British Columbia, Vol. 1, (Vancouver: Butterworths, 1991), 33.

draft the new Rules, wrote,

> our object was to streamline the rules (we deleted 351 of the present rules) to eliminate unnecessary procedures, to accommodate the realities of present practice and to write it all in clean prose.[12]

Statistics and information gathered from interviews with court administrators indicate that civil litigation cases involving personal injury in motor vehicle accidents comprise the largest category of civil cases initiated in the Vancouver Supreme Court.[13] For this reason, the majority of civil litigation case files examined from the civil registry for the purposes of this study were from this category. Other strongly represented types of cases are divorce and breach of contract, including wrongful dismissal; however, access to files pertaining to divorce and other family matters are restricted to those on record for the case, i.e., the respondent, petitioner and the counsel. Probate and bankruptcy procedures are not as varied as civil litigation. Any distinctions in the types of probate and bankruptcy case files will be discussed in the respective chapters.

A critical element of this study is the analysis of legal procedures as they are characterized by the court and the files maintained by the court registry. A civil action is

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[12]Peter Fraser, "The New Rules of Court: The Background," The Advocate 34 part 2 (February/March 1976), 119.

[13]Val Gosney, Trial Coordinator, Supreme Court of British Columbia, Vancouver Judicial District, interview by author, [May] 1992. Ms. Gosney states that approximately 65 percent of the trial dates booked involve litigation from a motor vehicle accident. Figures available for 1970, 1985 and 1986 would indicate that percentage to be far too high; however, the "Motor Vehicle" category (next to divorce) is, in all three years, the largest category represented in the number of new proceedings. For the figures from 1970, please see British Columbia, Attorney General, Justice Development Commission, Courts Division, Program Report for Period April 1 to November 30, 1974 AND Proposal for Continuing Development and Future Programs, November 30, 1974. Figures for the mid-eighties are quoted in Allan McEachern, "The Statistics of the Vancouver Trial List," The Advocate 45 (March 1987): 211-217.

conducted according to specific rules and regulations and involves the actions of many participants. The use of diplomatic criticism in an examination of the documents in the case files retained by the civil, probate and bankruptcy registries can identify and classify each procedure, the stages of the procedure, and to a lesser degree, the elements of the documents, and the roles of each participant in the action and the resulting document. The benefits of such a systematic approach will be in the application of the results to the traditional and emerging practices of archival and records management.

Diplomatics, as defined by Luciana Duranti in the first of a series of six articles which introduce the discipline to North American archivists, "is the discipline which studies the genesis, forms, and transmission of archival documents, and their relationship with the facts represented in them and with their creator, in order to identify, evaluate, and communicate their true nature."[14] Duranti emphasizes that the contributions of diplomatic criticism to the work of archivists cannot be isolated, but must be seen and utilized within an approach having "an historical-administrative-legal-diplomatic character."[15]

The strict definition of terms employed in diplomatic criticism, and its emphasis on the document form offer many benefits for both archivists and records managers. Its ability to bring to light the "relationships between documentary forms, types of acts, and procedural phases... [as well as] the types of interaction between persons and documents" enable records

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[14]Luciana Duranti, "Diplomatics: New Uses for an Old Science," Archivaria 28 (Summer 1989): 17, hereinafter refered to as "Diplomatics ... (Part I)."

[15]Duranti, "Diplomatics ... (Part I), 11.

professionals to better understand the process of record creation.[16] Traditional 'top-down' appraisal methods, which involve "reading regulations and identifying functions" seek to place the record creator in an historical/administrative context, while the 'bottom-up' approach of diplomatic criticism focuses on the transactions exhibited in the elements of the document.[17] By examining documents and naming those involved in the action, and by identifying the status of transmission of the documents, the analytical quality of diplomatics clarifies the appraisal function.[18] In addition, whatever the acquisition policy of an archival institution, as Duranti notes, we need to locate the "records dispersed among the relevant records creators."[19]

With the increasing tendency of records creators such as the Court Services Branch to automate their procedures and of archival institutions to institute automated description and access systems, the precise terminology of diplomatic criticism may facilitate standardization and thereby assist both in the identification of consistent data elements and, as a result, in the

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[16]Duranti, "Diplomatics: New Uses for an Old Science (Part IV)," Archivaria 31 (Winter 1990-91) 8, hereinafter refered to as "Diplomatics ... (Part IV)".

[17]Duranti, "Diplomatics ... (Part IV)," 16.

[18]For studies in special diplomatics, see Steven Davidson, "The Registration of a Deed of Land in Ontario: A Study in Special Diplomatics", Master of Archival Studies Thesis, the University of British Columbia, April 1994; Janet Turner, "Special Diplomatics and the Study of Authority in the United Church of Canada," Master of Archival Studies Thesis, University of British Columbia, July 1994; and Janice Simpson, "Broadcast Archives: A Diplomatic Examination," Master of Archival Studies Thesis, University of British Columbia, April 1994. Status of transmission refers to whether a document is a draft, original or copy. Duranti, "Diplomatics ... (Part I)," Archivaria 28 (Summer 1989), 18-21, 26.

[19]Duranti, "Diplomatics ... (Part IV)," 15.

archival function of arrangement and description.[20] As archivists are involved in the entire life continuum of the record, the concepts of diplomatics enable archivists to use diplomatic criticism to advise "records creators and system designers."[21]

For the purposes of this study a selection of cases was initially chosen from the British Columbia Decisions: Civil Cases (B.C.D.), a publication in which "[d]igests are published for every decision of the British Columbia Courts where written or transcribed oral Reasons are available and such Reasons contain sufficient information to publish a digest."[22] The publishers rely upon the submission of copies of Reasons for Judgement from the Registry Offices in the Province.[23] Evidently then, the B.C.D. is not a foolproof source of cases represented in the civil court registries of the Province; however, compared to a variety of published law reports, it offers a far more comprehensive format for selection.

While a large percentage of civil actions initiated do not reach the trial stage, the selection of cases from the B.C.D. limits one to those actions which have gone to court or have been finalized in Chambers. However, alternatives to the B.C.D., such as the file listings at the File Search desk at the Law Courts or law reports, either offer insufficient subject indexing or

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[20]From personal interviews with Leanne Dunbar, Assistant Deputy Registrar, 24 March 1992; and Richard Rondeaux, Acting Regional Director, Vancouver Law Courts Region, 11 March 1992, this writer learned that within 1991, the Vancouver registry, in conjunction with Court Services Branch, had begun work on a the design of an automated case management system. In addition to the design and institution of an automated system in the registry, by the use of standardized data elements, the goal is to link the system through all divisions of the Court Services Branch.

[21]Duranti, "Diplomatics ... (Part IV)," 18.

[22]British Columbia Decisions, Civil Cases, (Vancouver: Western Legal Publications (1982) Limited, 1991).

[23]British Columbia Decisions, 1975, 3.

narrow the field of choice still further. Files at the Court Registry are indexed by date, the style of cause, i.e., the action number, and the names of the plaintiff/petitioner and the defendant/respondent. An indication of subject is limited to distinctions between cases of divorce and/or actions under the Family Relations Act and other civil litigation. The editorial policy of publications such as Western Weekly Reports or British Columbia Law Reports is not explicitly stated, but chosen cases are primarily those with written as opposed to oral Reasons for Judgement and in which it is judged that a significant legal precedent or point of law has been set.[24]

The body of this thesis is comprised of three chapters, each of which addresses one of three legal procedures: civil litigation, probate or bankruptcy. It will not deal with the Appeal Registry or the Criminal Registry and, because of the access restrictions, there will be no examination of divorce or family law cases. Civil litigation case files in particular have been chosen from the period before and after the development and implementation of the revised Rules of Court. Discussion of the procedures is based upon an analysis of case files from the corresponding registries at the Vancouver Law Courts. The analysis is a diplomatic examination with specific emphasis on the phases of a procedure as presented by Luciana Duranti in her series of articles in Archivaria between 1989 and 1992.[25] The conclusion will discuss some

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[24]"Selection for law reporting in common law provinces operates more along English lines; selection is done by professional commercial editors and while it produces a numerically and structurally satisfying scheme its guidelines are not widely known." From Shirley A. Lounder, Case Law Reporting in Canada, edited by Lorna K. Rees-Potter, Canadian Law Information Council Occasional Paper, No. 4 (Ottawa, May 1982), 72, 73.

[25]Luciana Duranti, "Diplomatics ... (Part I):" 7-27; idem, "Diplomatics: New Uses for an Old Science (Part II)," Archivaria 29 (Winter 1989-90): 4-17, hereinafter refered to as Duranti, "Diplomatics ... (Part II);" idem, "Diplomatics: New Uses for an Old Science (Part III),"

of the more noteworthy findings of the examinations and will offer a number of general observations regarding the value of the procedural analysis for the work of records managers and archivists.

The purpose of this study is not to make judgements about present case processing systems or archival programs, but rather to document the manner in which legal procedures are currently represented in court records, and to test the validity of diplomatic analysis for modern records. Luciana Duranti notes how, for European archivists, the use of diplomatics is as unconscious as our use of grammar and syntax when we speak or write.[26] In Canada, however, the archival application of diplomatics has a very recent history. How it will be viewed in the future will be determined by Canadian archivists' estimation of its practical value and, more specifically, by the way in which studies such as these are incorporated into the work of archivists.

Archivaria 30 (Summer 1990): 4-20, hereinafter refered to as Duranti, "Diplomatics ... (Part III);" idem, "Diplomatics ... (Part IV):" 10-25; idem, "Diplomatics: New Uses for an Old Science (Part V)," Archivaria 32 (Summer 1991): 6-24, hereinafter refered to as Duranti, "Diplomatics ... (Part V);" idem, "Diplomatics: New Uses for an Old Science (Part IV)," Archivaria 33 (Winter 1991-92): 6-24, hereinafter refered to as Duranti, "Diplomatics ... (Part VI)."

[26]Duranti, "Diplomatics ... (Part VI), 19.

Chapter 1

The Civil Proceeding

Modern legal procedures are comprised of a great variety of transactions, out of which an assortment of documents is produced. The structure of the procedures which are carried out in the civil court system has been examined from many points of view, including that of procedural law, records management and case management. In law, procedure is "that which regulates the formal steps in an action or other judicial proceeding," and its course is often described in terms of a progression of legal actions and documents.[1] The law is the focus of attention for legal practitioners and scholars; whereas case flow management and the maintenance of court records is the concern of court administrators and records managers. The functions of each of the above groups may differ, but their perspective on the procedure of civil actions are remarkably similar. While records management in a court setting has tended to put more emphasis on the activities of those who process the documents, the work is inevitably governed by legal procedures. In turn, procedural law is dependent upon the rules and regulations established by the court administration, as exhibited in the successive editions and revisions of Rules of Court. This chapter on civil litigation case files will begin, therefore, with an overview of both the legal and the court administrative procedures associated with civil litigation and of their respective phases as established by procedural law and records

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[1]Henry Campbell Black, Black's Law Dictionary, 4th ed., by the Publisher's Editorial Staff (St. Paul, Minnesota: West Publishing Co., 1951), 1367.

management.

The British Columbia edition of the Guide to Civil Litigation is introduced by an overview of the "flow" of a typical civil proceeding. "A proceeding in the Supreme Court of British Columbia," it says, "can be either an 'action' or an 'originating application'. An action is commenced by a document titled 'Writ of Summons'; an originating application by 'Petition to the Court' or 'Praecipe'."[2] The Guide discusses a proceeding in terms of the documents required by each successive transaction within the action or originating application. In most instances the terms identifying documents and transactions coincide.

The focus of the Guide is on those formal transactions which require a document to be filed with the Court registry. "Commencement" marks the moment when the Court first becomes involved in the civil litigation procedure and, in the case of an action, is indicated by the filing in the Court registry of a Writ of Summons. The legal and circumstantial details of each case are unique; however, the manner in which the transactions and stages of the proceeding are carried out in Court is regulated by the stipulations of the Rules of Court.

Subsequent to the filing of the Writ of Summons is the pleadings stage. The Guide defines pleadings as a "category of documents in which each party sets out their facts, one by one in numbered paragraphs, [in] sequential order (usually chronologically)."[3] The Statement of Claim and Statement of Defence are the two most usual pleadings documents. The plaintiff, "the party instituting the action", uses the Statement of Claim to set out the facts, the relief

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[2]Evin Ross Publications Ltd., Guide to Civil Litigation, British Columbia Edition (Delta, British Columbia: Evin Ross Publications Ltd., March 1992), 4.

[3]Guide to Civil Litigation, 7.

sought and the place of trial. The Statement of Defence allows the defendant, "the party being sued", to respond to the plaintiff's claims, with admissions or denials.[4]

The next stage, referred to as the 'discovery stage', has each party endeavouring to gather information about the other's case. To discover what documents the opposing party has in its possession, a party will prepare a "List of Documents" which will be sent to the other party with an accompanying "Demand for Discovery of Documents". The Demand is "an official request that the other party prepare the List within 21 days. If one is not prepared, the demanding party may apply to Court for an Order that one be furnished."[5] In addition to documentary evidence, the parties will gather verbal evidence, by either conducting "Examinations for Discovery" or "Interrogatories". Called 'Discoveries' for short, an Examination for Discovery "is the procedure whereby the lawyer for one party examines (questions) the other party about the case." An Interrogatory is "a list of written questions which the other party is to answer."[6]

The arrangement of a trial date is usually begun at the end of the pleadings stage since the time needed for the discovery stage often can extend from several months to a year. The trial stage is initiated when the plaintiff, in most cases, files a "Notice of Trial" along with the "Trial Record". The Trial Record is a booklet which "contains various documents specific to the proceeding at hand -- used at trial for reference purposes."[7] The trial itself is recorded

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[4]Ibid.

[5]Ibid., 9.

[6]Ibid. 9, 10.

[7]Ibid., 10.

verbatim by the court reporter and is begun by the opening statement of the plaintiff's lawyer and concludes with the judges decision or, in the case of a jury trial, by the jury's examination of the facts.

Unless the case goes on to appeal, the post-trial stage involves the fulfilling of the specifications of the Judgement. Of the several types of judgements, one may require a party to pay a sum of money to the other party. In certain cases, documents such as "Garnishing Orders" or "Writs of Execution" must be used to assist the judgement creditor, the party to whom money is owed, to force satisfaction from a judgement debtor, the party required to pay the money.[8]

A proceeding in the form of an originating application is somewhat different from that of an action. Where an action is commenced with a Writ of Summons, the documents which commence an originating application are either a "Petition" or a "Praecipe".[9] As the Guide points out, "[g]enerally, an originating application is used where the facts of the case are not in dispute."[10] Because of this distinction, pleadings are not used in this latter form of proceeding, nor is there a need for Lists of Documents or Examinations for Discovery. While actions progress toward a trial, originating applications are heard before a Judge in Chambers, where "evidence is brought before the Court in Affidavit form, instead of calling witnesses."[11]

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[8]Ibid., 15.

[9]A praecipe is "an order, written out and signed, addressed to the clerk of a court, and requesting him to issue a particular writ" (Black's Law Dictionary, 4th ed., (St. Paul, Minnesota: West Publishing Co., 1968), 1335).

[10]Ibid., 16.

[11]Ibid.

At any point in the procedure of an action, an attempt may be made by either party to settle out of Court. Settlement attempts can be initiated by a 'without prejudice' letter where "[t]he lawyer making the settlement attempt puts the proposal in a letter with the words 'without prejudice' printed at the beginning of the letter."[12] "Offers to Settle", which indicate the amount the plaintiff will accept in settlement of the case, like the former settlement attempt, are not filed at the Court registry, but are simply delivered to the defendant. Where a defendant may attempt settlement, a sum of money is paid into Court, accompanied by a "Notice of Payment In". Acceptance of either of the latter two forms of settlement attempt requires the filing of a corresponding document such as "Consent to Judgement" or a "Notice of Acceptance".[13]

When circumstances such as the necessity to change the place of trial, for example, require a lawyer to obtain a Court Order, the lawyer requesting the change must make an 'interlocutory application' for the Court Order before a Judge. A document called a "Notice of Motion" sets out the lawyers' needs and the date the 'application' will be heard and is filed with a supporting Affidavit. If the request is approved, the Court Order "embodying the Judge's decision" which is prepared by the successful lawyer and approved by the other lawyer, is entered in the Court Registry.[14]

The conduct of a proceeding can include many more individual transactions than those

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[12]Ibid., 11.

[13]Ibid.

[14]Ibid., 9. An Order is a "[d]irection of a court or judge made or entered in writing" and a final Order is "[o]ne which terminates the action itself, or finally decides some matter litigated" (Black's Law Dictionary, 6th ed., 1096). For further discussion of court orders, see p. 78 below.

described above. However, a perusal of texts in procedural law and other guides to civil procedure all show a similar categorization of the general procedure. In an attempt to direct students and legal practitioners through the complex maze of rules of civil procedure, Arthur J. and Ronald A. Meagher differentiate between the two procedural routes of a civil proceeding. "The Application Route," they write,

> is a summary route where applications are normally heard in chambers and are based mainly on documentary evidence supported by legal submissions. ...The Trial Route is long and intricate and generally concerns material disputes of fact more than the issues of law.[15]

The first stage of the trial route, "The Pleading Stage [,] ... involves the giving of a notice and exchange of pleadings which define the issues, limit the facts, and set out the relief sought in an action." Each of the four remaining stages of the trial route, "The Discovery Stage", "The Interlocutory Applications Stage", "The Trial Stage", and the "After Judgement Order Stage"are also defined according to the purposes that stage serves within the entire civil procedure.

Just as in the study of procedural law, those concerned with the management of court records have sought to understand the course of a proceeding in terms of the documents generated by each phase. Unlike procedural law, however, which seeks to understand the "machinery for carrying on a suit",[16] the objective of records management is the care of court records. The documents which most concern records managers, therefore, are those which are used by the court system to both regulate and track the processing of each case.

This emphasis on the processing of a proceeding by the Court rather than the procedural

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[15]Arthur J. Meagher and Ronald A. Meagher, Civil Procedure Simplified (Toronto: Butterworths, 1983), 3.

[16]Black's Law Dictionary, 4th ed., 1367.

elements determined by the legal counsel is illustrated in Thomas Dribble's A Guide to Court Record Management. In it, the process is broken down into phases, each with its own specific functional components and the records created or used when an activity is carried out. Case processing is divided into four phases: 1) case initiation; 2) maintenance of active cases; 3) case disposition/closing; and 4) post-adjudication activity.[17] Rather than defining it clearly, Dribble leaves it to the reader to infer, from the titles of the phases and the activities and records included within it, the functional role of each phase as it relates to the entire procedure.

The activities of 'case initiation' consist of processing the case initiating documents, creating court documents, and establishing monitoring control. It is at this stage, for example, that the case number is assigned, and entered in a "case number assignment log".[18] In phase two, the case continues to be monitored as it progresses through the hearings and/or trial. Many of the documents used or created at this phase are a result of the activities of scheduling the case for hearing or trial. At the close of a case, in the third phase, documents such as the Judgement and Writ of Execution are created. Dribble notes that a function of this phase is statistical/management reporting which would then require statistical reports or files.[19] The final phase closely resembles the post-trial stage of procedural law, in which the requirements of the Judgements are fulfilled or Motions for Appeals are filed.

The approach of Thomas Dribble to the management of court records seems to be remarkably similar to the purpose of caseflow management as defined by Maureen Solomon for

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[17]Thomas G. Dribble, A Guide to Court Records Management ([Williamsburg, Virginia]: National Center for State Courts, 1986), 3.

[18]Ibid.

[19]Ibid.

the American Bar Association's Commission on Standards of Judicial Administration.[20] She writes that caseflow is "the continuum of activities through which cases move within a court", and caseflow management "encompasses all the functions directly associated with moving cases from the point of filing to the point of hearing, trial, or other disposition."[21] There is, however, an important distinction between the two approaches. While the primary goal of records management is to manage the records of the court, that of caseflow management is to manage a court procedure and, only indirectly, the records created throughout that procedure.

In her study of the data flow process in courts, Lorna K. Rees-Potter has incorporated aspects of both caseflow management and records management. One of the primary aims of the study, which is accompanied by a series of recommendations, was "to develop a comprehensive conceptual view of court records handling to form a base for efficient policy development and planning."[22] Toward this end, therefore, she has developed a model of court information flow based upon data received from a number of court registries throughout Canada. Corresponding to the phases of the procedures presented in the contexts of procedural law and records management, each part of the model system comprises a "process", and each process has a number of "activities". The five processes are initiation, preparation, trial, disposition and distribution.

"The initiation process," writes Rees-Potter, "commences the court involvement in a

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[20]Maureen Solomon, Caseflow Management in the Trial Court, Supporting Studies -- 2, American Bar Association Commission on Standards of Judicial Administration (American Bar Association, 1973), 4.

[21]Ibid.

[22]Lorna K. Rees-Potter, Communicating Court Information: Towards a Canadian Court Records Handling System (Ottawa: Canadian Law Information Council, 1984), iv.

court case [and] consequently is the point at which the court registry first handles documentation in a particular case."[23] At this stage the registry is occupied with "receiving documents; ... establishing files in the court registry; ... [and] ordering of original case documents in appeal cases." As the suit is begun, documents such as a Writ of Summons are filed at the registry and a case file is begun for that action or originating application. To provide for both their own and the public's access to these files, the case number and names of the parties are entered into a manual or automated index. In a variety of formats ranging from traditional cause books to procedure cards, each registry records the pertinent events, dates and documents filed under a particular case.[24]

At the second stage, the "preparation process", the registry continues to receive, record and file documents. In addition, it schedules the case for trial and issues Notices of Trial. While Rees-Potter is concerned primarily with an analysis of the "paperflow aspect of scheduling", she notes the importance of scheduling practices to caseflow management and "the broader issues of control of the process."[25]

The trial process encompasses the activities "required to record the proceedings of the trial as well as the recording and filing of exhibits at trial."[26] The appendices of Rees-Potter's study provide detailed tables of the activities and the records created and used at this stage of the procedure.

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[23]Ibid., 19.

[24]Ibid., 24.

[25]Ibid., 31.

[26]Ibid., 33.

The process of disposition involves the activities of recording the decision, preparing disposition documents, removing the case from active status, and storing and archiving. The form which a judicial decision will take depends upon the complexity of the case, the approach of the judge, and/or the case load of that court's jurisdiction. Oral decisions are read directly into court or can take the form of an "endorsement written on the case documents (i.e., on the information, the indictment, the record or an appeal book)."[27] The reading of some oral decisions is reserved for a period of time in order to allow for some research into the law by the judge. More complex cases may require a written reserved judgment which is released on an assigned date rather than being read into court.

The preparation of disposition documents refers to the notices, writs or orders noted in the post-trial stage of the discussion of procedural law. "In civil cases," writes Rees-Potter,

> these documents are prepared by the successful lawyer and approved by the unsuccessful lawyer before being presented to the court registrar. The court registrar checks the contents of these documents against the court proceedings or minutes previously filed in the registry by the court room clerk. The registrar signs the disposition documents.[28]

Storing and archiving procedures vary from court to court and province to province. Current practices for the retention and disposition of records of the British Columbia Supreme Court will soon undergo some modifications as the Ministry of the Attorney General, Court Services Branch is in the process of developing an Operational Records Classification System (ORCS). This may alter the retention schedule for Supreme Court case files which are currently maintained by the Court Services Branch for forty years before transfer to the British Columbia

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[27]Ibid., 35.

[28]Ibid., 41.

Archives and Records Service.

Finally, the process of distribution refers to the manner in which the decisions of the court are circulated.[29] The concern over equal access to judicial decisions being a stated motivation for Rees-Potter's study has meant that this section is rich in both description and recommendations to records managers and archivists.[30]

Procedural law has been developed and utilized in order to understand the legal rules and principles which guide the conduct of a civil proceeding. As mentioned earlier, the methodology used to realize this goal is to break the procedure down into its component parts and then identify the requirements of each part. The approach of court administrators who seek to both rationalize case flow and manage the mass of court documents created within their jurisdiction, involves a similar emphasis on the stages through which cases progress. Although the functions of lawyers and court administrators differ, both have recognized the benefits of viewing the civil proceeding as a particular procedure with relatively clearly defined phases.

Procedure, along with the juridical system, the act, the person, and the documentary form, is an element identified by diplomatists as necessary to understand and analyze the system of document creation. A procedure, as defined by Luciana Duranti, is "the formal sequence of steps, stages or phases whereby a transaction is carried out."[31] The six phases of a procedure are: 1) initiative, 2) inquiry, 3) consultation, 4) deliberation, 5) deliberation control, and 6) execution. The initiative phase is "constituted by those acts, written and/or oral, which start the

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[29]Ibid., 45.

[30]Ibid., iii.

[31]Duranti, "Diplomatics ... (Part IV)," 10.

mechanism of the procedure"; the inquiry phase "by the collection of the elements necessary to evaluate the situation"; the consultation phase "by the collection of opinions and advice after all the relevant data have been assembled"; the deliberation phase "by the final decision-making"; the deliberation control phase "by the control exercised by a physical or juridical person different from the author of the document embodying the transaction, on the substance of the deliberation and/or on its forms"; and the execution phase "by all the actions which give formal character to the transaction."[32]

The structure of a procedure, then, according to diplomatic theory, can be generalized, enabling those examining the documentary evidence of a procedure within a particular context to view each document or series of documents as belonging to a procedural phase, according to the role the transaction and the document play within the overall procedure. A procedural analysis, based upon diplomatics, and applied to the documents generated out of legal procedures, may not reveal any significant variations between the activities and phases discussed by law texts and court administrators, and those identified by the analysis. However, the generic framework and non-specific definitions offered by the diplomatic approach may provide those who must make decisions about the current and future maintenance and disposition of court documents with a stable and standard blueprint for the analysis of the parallel procedures of a civil proceeding and the administration of the registry system.

Let us now examine the procedure of a civil action and identify its component phases, and the actions and documents which can be attributed to each phase as exhibited in a selection of case files pulled from the Civil Registry of the Vancouver Law Courts.

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[32]Ibid., 14, 15.

THE INITIATIVE

As noted above, the court's involvement with a civil action is begun with a Writ of Summons. "[T]he Court," write Fraser and Horn, "gains jurisdiction over the subject matter of the litigation by reason of the action having been commenced; and gains jurisdiction over the defendant through service of process."[33]

The physical format of the Writ of Summons varied somewhat between the early 1970s and the late 1980s or early 1990s. In case #14031 of 1972, which involved a civil litigation over a personal injury incurred in a motor vehicle accident, the Writ of Summons is printed on legal-size paper. The elimination of most legal-size documents in the British Columbia courts did not occur until the mid-1970s. A stamped annotation on this and the other documents within the case file, indicate either that the Court had a microfilming program in place at this time or that case files from these years were microfilmed at a later date.[34]

At the time this case went to court, the procedure by which the Registry processed the Writ was indicated in the following Rule, O.5 (12):

> [t]he plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the Registrar a copy, written or printed, or partly written and partly printed, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person. Upon the face

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[33]Fraser and Horn, 183.

[34]Supreme Court of British Columbia, Vancouver Law Courts, Case #14031, Writ of Summons, 15 February 1972. (Hereafter each case file will be cited only by case number, document and date). A definitive date for a microfilming program at the Vancouver Law Courts or the Court Records Centre has been difficult to determine. Interviews with court registry and records centre staff indicate that probate records may have been microfilmed in the 1970s for a time, and that there was a microfilming program in place in the mid- to late-1980s for civil files. Bill Vernon, Court Records Centre, interview by the author, [September] 1992; Doreen Folkestad, Deputy District Registrar, interview by the author, [September] 1993.

> of every such writ there shall be a statement to the effect that the defendant do cause an appearance to be entered at the Registry out of which the writ is issued.

The form and elements of the Writ of Summons were specifically determined by the Rules of Court, O.1 to O.5.[35]

The Writ of Summons notifies the defendant of the action being commenced against him or her, but in essence, the document serves as a summons issued by the Supreme Court of British Columbia. In diplomatic terms, the Court is the author of the act of summoning the defendant and of the Writ, since the "author of a document is the person(s) competent for the creation of the document, which is issued by him or by his command, or in his name."[36] The importance of this document as compared to most of the others generated throughout a civil action, is confirmed both by Rule O.5 (11) of the 1966 Rules of the Supreme Court and illustrated by elements within the document itself. The rule states, "[e]very writ of summons shall be sealed by the Registrar, and shall thereupon be deemed to be issued." Within documents of civil proceedings, only Court Orders and Writs have the "Supreme Court of British Columbia Seal". In addition, the Court charges a fee for the issuing of a Writ, which in 1972 was $20.00. The entitling of the Writ, or the "name, title, capacity and address of the physical or juridical person issuing the document, or of which the author of the document is an agent" reads, "**ELIZABETH THE SECOND**, by the Grace of God, of the United Kingdom, Canada and Her Other Realms and Territories, QUEEN, Head of the Commonwealth, Defender of the Faith."[37] This is the only document in the case file with such an entitling.

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[35]Supreme Court of British Columbia, Rules of Court, 1963, rule O.5 (12).

[36]Duranti, "Diplomatics ... (Part III)", 5.

[37]Duranti, "Diplomatics ... (Part V)," 12; Case #14031, 1972.

Variations between the examples of Writs commenced in the early 1970s and those from the early 1990s appear primarily in the wording of the text or the "central part of the document, where we find the manifestation of the will of the author, the evidence of the act, or the memory of it", and at the place in the document where information about the time allowed for entering an appearance is conveyed to the defendant.[38] The earlier Writ includes the information within the disposition of the text, while the later Writs only refer the defendant to an 'endorsement' which appears after the eschatocol, i.e., that area of a document which follows the text and contains the signatures of the issuers of the document.[39] In legal terms, an endorsement is understood to be that act of endorsing or writing one's name on the back of a document such as a cheque, thereby transferring the funds or property to another.[40] It can also mean "[a]n addition or amendment of a contract, legislative bill, [or] document."[41] The Rules of Court give very specific instructions regarding the form of endorsements, and documents which do not conform will be unacceptable for registration.

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[38]Duranti, "Diplomatics ... (Part V)," 14.

[39]The eschatocol is the intrinsic section of the documentary form which "contains the documentation context of the action (i.e., enunciation of the means of validation, indication of the responsibilities for documentation of the act) and the final formulae" (Duranti, "Diplomatics ... (Part V)," 11). This thesis concentrates on a procedural analysis of court documents, using the definitions of procedures and their phases provided by Luciana Duranti in Part IV of her series on diplomatics. For a more complete and detailed explanation of documentary form, that is the extrinsic elements, or those "which constitute the material make-up of the document and its external appearance", and the intrinsic elements, or those which "are considered to be the integral components of intellectual articulation, the mode of presentation of the document's content, or the parts determining the tenor of the whole" see Duranti, "Diplomatics ... (Part V)," 6-24.

[40]Blacks Law Dictionary, 6th ed., 1990, 774.

[41]Funk & Wagnalls, Standard College Dictionary (Toronto: Fitzhenry & Whiteside Limited, 1980), 437.

According to the definitions provided by the Rules of Court (1976), an Appearance is a document filed by the defendant at the Registry to "indicate an intention to contest the action or application."[42] Unlike the Writ of Summons, the author of the document and the action is the defendant, not the Court. The files examined for this study contain a number of examples of this document. Its purpose, for both those of the earlier and later period, is as straightforward as the above definition implies. The one significant variation, in the Appearances dated from the late 1980s and the early 1990s, is the addition of an 'endorsement' which serves as a reminder to the defendant of the time limit to enter a Statement of Defence.

With more rules governing them than any other category of record, pleadings represent an important series of documents included in the initiative phase of a civil action. As defined in the Rules of Court (1977), "[p]leadings usually consist of a statement of claim from the plaintiff and a statement of defence from the defendant, which may include a counterclaim." The authors of pleadings documents and actions are one or the other party in the civil action. Fraser and Horn note the three purposes of pleadings. They

> identify the event or transaction with which the litigation is concerned, set out the legal consequences which the party contends will flow from the event or transaction and specify the relief or remedy that the party seeks.[43]

Pleadings, as emphasized by the Rules of Court, serve only to present the facts of either the claim or defence, and must not introduce evidence to be used to prove the case.[44]

The Statement of Claim expands upon the shorter claim statement appended to the Writ,

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[42]1976 Rules of Court, 1-10.

[43]Fraser and Horn, 226.

[44]Rules of Court, 1961, O. 19 -4.

and in one case file examined, is actually attached to it.[45] In all the others, however, it is a separate document, filed either on the same day as the Writ, or up to ten months after. The Rules of Court updated to August 1991 specify that the Statement of Claim may be filed with the Writ or up to 21 days after the Appearance is entered by the defendant.[46]

In case #25257, a civil litigation case of wrongful dismissal brought in 1973, the Writ was filed on August 3, and the Statement of Claim on the 28th of that same month. A Statement of Defence and Counterclaim was filed by the defendant on September 26, 1973. In order to enter an amended Statement of Defence, the defendant's solicitor filed a Notice of Motion on October 18, 1973. The intent of the Notice of Motion was to notify the plaintiff and his solicitors of the defendant's intention to obtain an Interlocutory Order from the Court to amend his Statement of Defence. In addition to the original, the case file contains an authentic copy of the Notice of Motion. An authentic copy is "a copy certified by officials authorized to execute such a function, so as to render it legally admissible in evidence."[47]

In case #25257/73, the initiative phase concludes with the plaintiff's Reply to Counterclaim. The Reply is similar in purpose to a Statement of Defence to the Counterclaim the defendant has brought against the plaintiff.

THE INQUIRY

The inquiry phase includes those documents and transactions the purpose of which is to

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[45]Case # 902538, Writ of Summons/Statement of Claim, 22 May 1990.

[46]Rules of Court and Related Enactments, vol. 1, updated to August 30, 1991 (Victoria: Queen's Printer for British Columbia, 1991), rule 20(2).

[47]Duranti, "Diplomatics ... (Part I)," 21.

gather information and evidence of the other party's case, for use in the proving of one's own case. In the case file #25257/73, for example, the documents which are the result of transactions carried out in the inquiry phase are the Demand for Discovery of Documents and the Examinations of Discovery of the defendant and the plaintiff. Authored and filed in the Vancouver Registry by the defendant's solicitor on 5 December 1973, the Demand for Discovery of Documents calls on the addressee, the plaintiff and his solicitors, to produce the documents relating to the matters in question in the action. The appointment dates for the Examinations for Discovery have been arranged with the District Registrar. An Appointment document dated 15 May 1974 sets the time and place for the Examination of the plaintiff for 5 June 1974, but no such document for the Examination of the defendant exists in the file. The booklets containing transcripts authored by the examining lawyer of the original Examinations of both defendant and plaintiff are the last two documents included in the case file.

In the case file of a motor vehicle civil action brought against the Insurance Corporation of British Columbia (ICBC) in 1990, the defendant, in the process of obtaining discovery of documents, has had documents made available by both the police and the hospital. The release of these documents required, in varying forms, the consent of the plaintiff. The release of police records, however, also required a Court Order. To obtain the Court Order, the plaintiff's lawyer submitted a Praecipe as an application to the Court for a Consent Order. The author of the Praecipe document is the plaintiff's lawyer, and the author of the action of application is the plaintiff. The author of the Consent Order document and action is the Court.

Release of the records in hospital custody did not require a Court Order. The procedure the hospital followed for the release of medical documents is referred to in the text of an

Affidavit accompanying copies of those documents entered into Chambers during the trial. In the words of the counsel for the defendant's legal secretary, "[i]n the course of this action counsel for the Defendant was provided with an authorization signed by the Plaintiff for the release of all of his hospital records from University Hospital."[48]

Unlike the wrongful dismissal action brought in 1973, documents from the inquiry phase of case #B902538 are conspicuous for their absence from the case file. As noted above, other than the copies of some of the documents obtained by the counsel for the defendant during the discovery of documents stage of the case, parts of which appear later with sworn affidavits submitted during the trial stage, the Consent Order and the Praecipe are the only documentary evidence of the Court's involvement in this phase of the procedure. An examination of the documents in the case file of a motor vehicle civil action from 1973 shows that a Demand for the Discovery of Documents is the documentary evidence of the inquiry phase of the procedure.

THE CONSULTATION

In a civil action, the consultation phase is comprised of the actions occurring in and the documents resulting from the trial or hearing. Assisted by the precedents of other judgments, the decision of the judge or master will be based upon the arguments and evidence presented by the opposing parties of the action. The documents within a case file most likely to represent this stage are Exhibits and the supporting sworn Affidavits. Also representative of the consultation phase of the civil action procedure are the shorthand version of the trial proceedings recorded by the court recorder, tapes of the trial, and transcripts produced after the trial. However, only

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[48]Case #B902538, Affidavit, 13 August 1991, 1.

rarely do these documents appear in a case file.

In case #B902538, the plaintiff applied for a summary trial under Rule 18A. Summary trials, in this case "an application ... for Judgment, in favour of the Plaintiff", are held in Chambers before a judge or master.[49] Official notice of his intention, in the form of a Notice of Motion, must be entered in Chambers and delivered to all parties.

To support its side of the case, each party entered a number of Affidavits accompanied by supporting documentary exhibits. Counsel for the defendant, for example, entered sworn Affidavits of the counsel's legal secretaries with copies of University Hospital and police records as exhibits, and Affidavits of Insurance Corporation of British Columbia employees with claim forms of the Corporation. The stamps of registration in all but one of the Affidavits in this case file, which would be defined as annotations in the execution phase in a diplomatic examination of these specific documents, show that the documents were filed at the Chambers Registry desk, not the general Civil Registry.

The use of Affidavits, or sworn statements, with or without accompanying exhibits, is not restricted to providing support or evidence for a party's case at a summary trial. Cases which go to trial may contain a number of Affidavits which have been entered by the counsel for the plaintiff or the defendant at various times throughout the procedure. In case #22255/73, for example, Affidavits and exhibits were entered by the counsel for the defendant when support was required for their arguments at a hearing before a judge for an application by the plaintiff to adjourn the trial to a new date. As documents, Affidavits can not be said, then, to be specific to the consultation phase, since those of the latter type may appear at any stage of a civil

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[49]Case #B902538, Notice of Motion, 14 June 1991.

proceeding. What can be said, however, is that they serve a consultative purpose, whether at the level of the overall civil proceeding, or at the lesser procedural level of a hearing within the larger proceeding.

In cases which go to trial, evidence is submitted primarily at the trial as exhibits, not by Affidavit. In most case files, the original exhibits are not included. According to Registry staff, removal of exhibits from the case file, and separate storage constitute the general practice since they tend to be so voluminous.[50] Cases from the early 1970s which went to trial contain an exhibit list itemising all the documentary exhibits entered by the counsels both for the plaintiff and the defendant.

Because of the scheduling requirements of the Court, preparation for the consultation phase may have begun up to a year before the trial.[51] For two cases from 1973, a motor vehicle civil action, case #22255/73, and a case brought for wrongful dismissal, case #23540/73, the Notices of Trial were filed ten months and nine months respectively prior to the date of the trial. Similarly, in case #C886382, a suit brought for damages in a motor vehicle/bicycle accident in 1988, the Notice of Trial is dated December 20, 1989, and the proposed trial date is December 6, 1990. A Notice of Trial is truly an administrative record of the Court. The endorsements on the back of the documents indicate that they were prepared or written by the plaintiffs solicitors, but the attestation in the eschatocol is that of the Assistant Deputy/District Registrar and is accompanied by that person's initials.

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[50]Telephone interview with Leanne Dunbar, Deputy Registrar, Civil Court Registry, Vancouver Law Courts, 22 October 1992.

[51]Guide to Civil Litigation, 10, footnote #8.

Applications pursuant to Rule 18A are heard in Chambers and do not call for the resources required by a full trial. Their scheduling, therefore, can be completed as close as a month before the hearing. Case #C900558 allows less than two weeks between the filing of the Notice of Motion and the date of the hearing of the application, and case #B902538 only five weeks. The Notice of Motion is simply a notification by the plaintiff to the defendant of the intention to apply to the Judge "for Judgment, in favour of the Plaintiff, on an issue contained in paragraph 6 of the Statement of Defence herein pursuant to Rule 18A."[52]

The process of an adjournment of a trial or Rule 18A application also involves administrative activities within the Court, and therefore the generation of routine documents by counsel. In the case file of action #B902538, a Praecipe was filed by the solicitor for the plaintiff requesting an adjournment of the 18A application. A hand-written annotation in the handling phase on the Praecipe, "not on Masters [sic] list or Judges [sic] list please provide copy of motion", explains why it is accompanied by a photocopy of the original Motion.[53] A further adjournment is requested by telephone and evidence for this is provided by a 'Chambers Telephone Adjournments' form. The form records the name of the person calling, the name of counsel, the file number, the style of cause, the date of application, the date the hearing was adjourned to, whether it will be heard by a judge or masters, whether the adjournment is by consent, and the operator's initials. To obtain an adjournment of the trial date, a Motion must be made in Court, which may or may not be met with opposition by the other party. In the previously mentioned case #22255/73, the Motion made on behalf of the plaintiffs was

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[52]Case #B902538, Notice of Motion, 13 June 1991.

[53]Case #C900558, 4 September 1991.

accompanied by the counsel's Affidavit giving reasons for the proposed adjournment. It was met by an Affidavit from the counsel for the defendant, arguing against the adjournment.

The case files of trials held in the early 1970s contain another administrative document, the "Supreme Court Exhibit List", which lists the exhibit, the exhibit number, the person by whom it was submitted, the person to whom it was released, and the date. While the more current files examined are of cases which did not go to trial, the practice of maintaining an Exhibit List still exists. Both case #23540/73 and case #22255/73 have these lists included in the case file. Although it was never the usual procedure, all exhibits for case #22255/73 have remained in the file, contained in an envelope. Not every case file of an action which went to court reveals an Exhibit List, as its exclusion from the file of case #14031/72 reveals.

In two examples of actions which were initiated in 1988, there are similar Exhibit Lists in addition to the "Trial Record". The Trial Records were stapled to the front inside cover of the file folder. With the sub-title of "Minute Sheet", they provide a summary of the record of proceedings of the trial itself.

THE DELIBERATION

The deliberation phase of a procedure in terms of the civil proceeding involves the decision of the court regarding the outcome of a particular suit. As noted by Rees-Potter, the format in which the judicial decision is recorded and distributed varies greatly.[54] There are examples of judicial decisions in most of the case files examined, both from before and after the introduction of the new Rules of Court in 1977. Case #22255/73 was decided at trial in January

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[54]Rees-Potter, 35, 36.

of 1975, and the Reasons for Judgment were submitted and stamped registered on the first of May, 1975. Similarly, case #23540/73 was tried on May 14 and 28, 1974, and the Reasons for Judgment were submitted and stamped on August 2, 1974. The time lag between the hearing or trial and the submission of the Reasons for Judgment is due to the extensive workload of the Court and the Judges. Judges are assigned a limited period of time out of a two-week schedule in which to prepare and write up their decisions. The Reasons for Judgment contained in the case file of case #14031/72, however, are submitted only a week after the date of the trial.

Few relevant variations seem to exist between the Reasons of Judgment of the earlier period and those of the latter. The latter documents are on specially-designed letter-size paper, each page provided with a column of line numbers which would allow for easier reference and citation to that Judgment.[55] Perhaps, since both of these cases are decided by a ruling under Rule 18A and not a full trial, the period of time between the trial and the submitting or registering of the Reasons for Judgment is considerably less than two of the cases referred to from the earlier period. However, without thorough statistical evidence, such conclusions would be pure conjecture.

A judicial decision as defined in Black's Law Dictionary is an "[a]pplication by a court or tribunal exercising judicial authority or competent jurisdiction of the law to a state of facts proved, or admitted to be true, and a declaration of the consequences which follow."[56] The importance of judicial decisions to the ongoing process of the law, and therefore the importance

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[55]Case # C900558, Reasons for Judgment, 28 May 1991; case number B902538, Reasons for Judgment, 29 November 1991.

[56]Black's Law Dictionary, 6th ed., 847.

of the recording and distribution of the same, is fully examined in Rees-Potter's study. She points out that judicial decisions are a result of court processes and that, because "the business of the court is paper and records management," the inefficient management of court procedures will lead to uneven access to judicial decisions, especially unpublished ones.[57]

THE DELIBERATION CONTROL

Deliberation control is "constituted by the control exercised by a physical or juridical person different from the author of the document embodying the transaction, on the substance of the deliberation and/or on its forms."[58] In a civil action procedure, control of the deliberation (the judgment), is carried out by the parties to the action. If, as a result of the deliberation control, an irregularity in the deliberation is discovered, the defendant or the plaintiff may initiate an appeal by filing a "Notice of Appeal". The Notice of Appeal document is authored by the lawyer of the party who is bringing an appeal. If no appeal is launched, no evidence of the deliberation control phase will appear in the civil action case file.

Appeals of a civil action are procedures in and of themselves. At the Vancouver Law Courts, each appeal is assigned a new number, and all documents having to do with that appeal procedure are filed with the Appeals Registry.

THE EXECUTION

The execution phase of a civil proceeding corresponds to the post-trial stage discussed

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[57]Rees-Potter.

[58]Duranti, "Diplomatics ... (Part IV)", 14.

above in the context of procedural law. In diplomatic terms, it consists of the actions which "give formal character" to the judicial decision which constitute the execution phase.[59] Examples of documents resulting from such actions are Writs of Execution and Garnishing Orders.

A variety of other examples of these documents can be observed within the case files of the civil proceedings already discussed. In case #C900558, the judicial decision called for the dismissal of the "plaintiff's claim with costs to the defendant."[60] In May of 1992, an Order formalizing that decision was entered into the Vancouver Registry. In the examination of this document there are several elements which are immediately notable. The first is that this is a photocopy of the original Order. An annotation in the handling phase in the form of a Registry stamp indicates the date the Order was entered in addition to citing a volume and folio number. The original is not maintained in the case file, but in a separate binder, as are all other Court Orders.[61] Secondly, as with the Writ of Summons, Court Orders are stamped with the official Supreme Court of British Columbia seal. Finally, it can be noted that there is an extended period of time between the date on the Reasons for Judgment and the date of the final Court Order calling for the execution of that decision

Occurring between the date of the filing of the Reasons for Judgment and the final Order in the file of case #C900558, were several additional actions in the deliberation phase. Solicitors for the defendant attempted a number of times to serve the plaintiff, at this time acting for

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[59]Duranti, "Diplomatics ... (Part IV)," 14.

[60]Case # C900558, Reasons for Judgment, May 28, 1991.

[61]Interview with Doreen Folkstad, Deputy Registrar, Probate and Bankruptcy, Vancouver Law Courts, 7 May 1992.

himself, with notice of an Appointment for the Taxation of the Bill of Costs of the Defendant. Because the plaintiff was able to avoid the service of this document, the defendant approached the Court for an Order to allow for a substitutional service "by posting the Appointment and Bill of Costs ... to the Plaintiff's home."[62]

The final Order of case #B902538 is much the same as that of case #C900558. It too calls for the "Plaintiff's claim against the Defendant [to] be ... dismissed with costs." The Court is the author of the Order. The Court's representative, the District Registrar, is the writer of the document, and as such, his signature appears as a subscription to the document.[63] The Order translates the judicial decision into an official and formal court instruction to the parties of the proceeding. The executory function it serves has dictated that the original court Order be maintained separately from the case file.

Examples of documents which are representative of the execution phase in the case files of proceedings from the early 1970s include similar Court Orders. The file of case #22255/73 contains a final Order which confirms the judgment of Justice MacKoff for the plaintiffs. A copy of the Order was filed with a Praecipe requiring the payment out of Court of $16,000.00 to the counsel for the plaintiffs. The final document in the file, in terms of the date of registration, is the Satisfaction Piece signed by the plaintiffs in March 1976, more than three

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[62]Case #C900558, Order, 23 March 1992.

[63]Case #B902538, Order, 20 January 1992. For a full discussion and explanation of the persons concurring in the formation of a document, see Duranti, "Diplomatics ... (Part III)," 4-20.

years after the Writ of Summons was filed.[64] Judgment for case #14031/72 also found for the plaintiffs. Therefore, this file also contains an Order which formalized the findings stated by the Judge in his Reasons for Judgment in addition to the Satisfaction Piece signed by the plaintiffs in June of 1975, again more than three years after the filing of the Writ of Summons.

A full diplomatic analysis usually involves an examination and discussion of each of the elements of document-creation: the juridical system, the act, the persons, and the documentary form. The above discussion has instead concentrated on procedure, that "which, within a juridical system, ...[is] followed by the persons in order to accomplish acts resulting in documents."[65] By no means do the documents discussed here, within the context of the phases of the procedure, represent fully the range of documents which can be generated during the successive actions which make up a civil proceeding. They are, however, real documents enacting real proceedings, and as such, accurate representations of the function such documents serve within each particular phase of a proceeding.

The succeeding chapters will discuss case files within the probate and bankruptcy registries. Afterwards, the implications of the procedural analysis of the selected files will be examined.

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[64]A Satisfaction Piece is a "memorandum in writing, entitled in a cause, stating that satisfaction is acknowledged between the parties, plaintiff and defendant. Upon this being duly acknowledged and filed in the office where the record of the judgment is, the judgment becomes satisfied, and the defendant discharged from it" (Black's Law Dictionary, 4th ed., 1509).

[65]Duranti, "Diplomatics ... (Part IV)", 11.

TABLE 1

CIVIL PROCEEDING - PHASES AND DOCUMENTS[66]

Initiative	Writ of Summons Appearance Statement of Claim Statement of Defence Counterclaim Reply to Counterclaim
Inquiry	Demand for Discovery of Documents Examinations of Discovery Appointments Praecipe Consent Order
Consultation	Exhibits Affidavit Transcripts Notice of Motion Notice of Trial Trial Record
Deliberation	Reasons for Judgment
Deliberation Control	Notice of Appeal
Execution	Appointment for the Taxation of the Bill of Costs of the Defendant Praecipe Court Order Satisfaction Piece

[66]Documents listed here are those found in the author's examination of civil action case files and discussed in Chapter 1. This does not represent a complete list of documents which may appear in a civil action case file.

Chapter 2

Probate

A discussion of the procedure of probate practice will differ somewhat from that which introduced the analysis of the phases of civil litigation. Unlike civil litigation, probate practice has no supportive field of procedural law which outlines the conduct of a civil proceeding in terms of its component phases. The granting of Letters Probate, or simply Probate, is the proceeding by which the validity of the will of a deceased person is legally proved by the Court and a Grant of Probate signed by the Registrar and under the seal of the Court is issued confirming the appointment of the executor or executors.[1] If there is no will or if the will designates no executor or the named executor cannot or declines to act, then the Court must appoint an administrator of the estate. In this case the Court grants Letters of Administration to the applicant.

A Will is "[t]he written statement by which a person instructs how her or his estate should be distributed after death. [It]...[i]ncludes a testament, a codicil, and every other testamentary instrument of which probate may be granted."[2] The person designated in the Will as the 'Executor' (or 'Executrix', if female) ensures that the deceased's wishes are carried out. A person who dies without leaving a will is called an 'Intestate' and the estate is called an

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[1]J.B. Kowarsky and H.A. Stephens, British Columbia Practice (Vancouver: Commercial Stationers Company Ltd., [1968]), 1.

[2]Daphne A. Dukelow and Betsy Nuse, The Dictionary of Canadian Law (Barrie, Ontario: Thomson Professional Publishing Canada, 1991), 1162.

'Intestacy'. Where the Will determines the distribution of the estate of a testator or testatrix, provisions outlined in the Administration Act govern the distribution of an intestacy. To administer the intestacy, the Court appoints an 'Administrator'. While there are specific rules which apply to intestacies and specific documents required to execute the procedure, the individual phases parallel that of cases where a Will exists.

Non-contentious business of probate is referred to as the granting of probate in 'common form' and occurs when the validity of the Will is not questioned. In the majority of cases the process of proving a Will or obtaining grants of probate or administration is a non-contentious procedure requiring the submission of certain documents to any Registry of the Supreme Court. In the Probate Registry of the Vancouver Judicial District, probate applications are approved in form by the registrar and "listed on a Chamber Sheet which is signed by the Judge in chambers." Smaller registries require a Fiat to be prepared which is examined and signed by the Judge.[3]

Contentious business of probate, or the proving of a Will in 'solemn form' is a more complex procedure which requires an action in Court of Probate to determine the validity of or to interpret the Will. In instances of proving the Will in solemn form, other than where required by the Court, the procedure is very much like that of a civil action. As with the actions described in the previous chapter, it is initiated with a Writ of Summons and is executed with an Order after which an application can "be made for probate, referring to the Order in the

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[3]J.B. Kowarsky and H.A. Stephens, British Columbia Practice, (Vancouver: Commercial Stationers Company Ltd., [1969]), 1. Confirmation that current practice at the Vancouver Probate Registry remains as the 1968 publication presents it was provided in an interview with Doreen Folkestad, Deputy District Registrar, The Law Courts, Vancouver, 27 April, 1992.

affidavit leading to the grant."[4] Unless copies of the Writ of Summons and the Letters Probate were filed with the Probate Registry, there will be no documentary evidence within a Probate file that a litigation proceeding relating to this estate had been initiated.

The application for and granting of probate or administration is part of the larger procedure of the administration of an estate. To carry out the administration of an estate "means to assemble the deceased's assets, pay all legitimate debts and distribute the rest to those entitled."[5] The procedure which is documented in the files of the Probate Registry and is the focus of this chapter is the granting of probate or administration by the Court, not the larger legal procedure generally referred to as the administration of an estate.

THE INITIATIVE

The act which precipitates the Court's involvement in the procedure of probate and administration is the notification of the Court by the testator's or testatrix's solicitor, by the person named in the Will as the Executor or Executrix of the estate, or by the applicant for Administration, of the requirement for the granting of Letters Probate or Letters of Administration. The document in which that act is manifested is a Praecipe. The Praecipe, however, is only one of several documents filed with the Probate Registry at the time a probate procedure is initiated. Kowarsky and Stephens present a list of documents which, in the 1960s, were "required to be filed in each application for Probate." They were: the Praecipe, the Will

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[4]Peter W. Bogardus, Kenneth N. Burnett, Marlene Scott and Roger J.L. Worthington, Probate Practice Manual - 1984 (Vancouver: The Continuing Legal Education Society of British Columbia, 1984), 14-5, 14-9. The rule they referred to is Rule 61(11).

[5]Dukelow and Nuse, 18.

Search Letter, the original Will, the Oath of Executor, the Affidavit of Value Form N.1 Long in duplicate, and the Affidavit required by Section 143 (a) of the Administration Act.[6] While the amendment of the Administration Act means that the Section 143 Affidavit is now referred to as the Section 135 Affidavit, the requirements for the application for granting of Letters Probate have remained essentially the same. Rule 61(3) of the 1991 printing of the Rules of Court states "that the applicant shall deposit with the registrar the original Will, if any, and file a Praecipe and an Affidavit of Executor or Administrator, in Form 69, 70 or 71, and any further Affidavits as may be required by these rules."[7]

Many of the documents in a probate or administration file are filed concurrently. The action of the Court becomes one of approval of the facts expressed in those documents in accordance with the requirements of the Rules of Court and the Administration Act. In probate file #193734, the approval process is well-illustrated in the annotations on a Praecipe originally filed on 18 April, 1990. The Praecipe, filed by the solicitors of the deceased and dated "this 30 day of March, 1990", notifies the Court of the requirement to prove the Will of the deceased. A date stamp of "1990 APR 18" with the handwritten notation of "Rej" indicates the application was rejected on that date. Down the side of the document a series of handwritten notes by the registrar instruct the solicitor to address some discrepancies in the Will or in the process of application. Until those discrepancies are addressed and the proper documents offering proof of it are filed, the Praecipe and the other documents filed with the original application will not be stamped with the registry date stamp.

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[6]Kowarsky and Stephens, 2.

[7]Rules of Court, 6(3).

As with the granting of Letters Probate, certain documents are required to be filed with the application for Administration. Kowarsky and Stephens' manual lists the following documents as necessary in the application process: the Praecipe, the Oath of Administrator, the Will Search Notice, the Affidavit pursuant to Section 143 (a) Administration Act, the Affidavit of Value Form No. 1 Long in duplicate, consents of potential beneficiaries, consents of creditors, and other material as may be required by the Registrar.[8]

File #194363 documents the granting of Letters of Administration in a case where an infant (referred to in the Rules of Court and the Administration Act as a person under a disability) is a beneficiary of the estate. This case is more complex than the Probate file #193734. It is a confusion of dates, both of document composition and registry filing dates, creating a puzzle to be solved by this reader of the file. The file contains a series of documents stapled together and stamped with the registry date of 18 September, 1990, the date the application is approved by the Court. There is an application Praecipe which has no Registry date stamp, but was written on 23 May, 1990. There is also a photocopy of this Praecipe stamped with the registry date of 18 September, 1990 and containing annotations by the Registrar.[9]

The application Praecipe originally filed by the lawyer represents the initiative phase of the granting of Letters of Administration. According to Doreen Folkestad, the Deputy Registrar of Probate and Bankruptcy at the time of this study, if the application is incomplete or incorrect, the Praecipe and other documents filed with the application are returned to the lawyer for

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[8]Kowarsky and Stephens, 16.

[9]Probate file #194363, Praecipe, 23 May 1990.

correction.[10] At one time, the registrar may have indicated the corrections necessary in notations on the Praecipe itself. Later, a correction sheet was created which allowed the Registrar to outline the required changes. The correction sheet is stapled to the Praecipe and returned to the lawyer. Because the Praecipe or the correction sheet are not always returned from the lawyer's office to the Probate Registry along with the corrections, the Registry maintains copies of either the annotated Praecipe or the correction sheet with the file to refresh the Registrar's memory about the corrections requested. A photocopied and annotated Praecipe and returned correction sheet are not part of the official Court Record and are often pulled from the file. When, as in the case of probate file #194363, they have remained in the file, they become part of the documentary evidence of the inquiry phase, that is, the collection of information necessary for the Court to approve the application for Letters of Administration.

THE INQUIRY

Notations on application Praecipes in both the probate and administration files indicate the registrar's responsibility to fulfil the requirement of Rule 61(5) which states,

> [t]he registrar may approve the application and mark the documents as approved, but if the registrar refuses to approve the application the registrar shall note on the documents his or her reasons for refusing approval.[11]

The notations refer the reader of the file to other documents which should have been filed with the Praecipe. These are the documents which provide the registrar with the proof that all the

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[10]Doreen Folkestad, Deputy Registrar of Probate and Bankruptcy, Vancouver Law Courts, interview by author, 31 March 1992.

[11]Rules of Court, 61(5).

necessary actions of the Executor or the solicitor have been executed. Notation 4 on the Praecipe in file #193437, for example, calls for clarification of elements of the Will to be provided in the form of a witness's Affidavit. "The will," writes the registrar,

> indicates the testatrix set her hand to each page of will. This does not appear to have happened. Also, she has initialled right over 'April'. Pls [sic] provide an affid [sic] of a witness that covers these points. Was this only will sworn? Was testatrix able to read will, or was it read to her and did she appear to understand and approve of it?[12]

The requested Affidavit in which the solicitor, as a witness, swears to the proper drafting of the will, was subsequently filed by the solicitor on 28 May 1990.

Notation 1 indicates the requirement of a will search. The Application for 'Search of Wills Notice' was subsequently filed on June 14, 1990. Rule 61(31) stipulates that it must be shown that a search for a Will has been made. British Columbia has had a Wills Registry since 1945. Registration of one's Will is voluntary, but the search for a Will in a Probate or Administration application must include a search of the provincial Wills Registry, and the application for probate must include "a letter from the Director of Vital Statistics showing the results of a search at the director's office for a Notice of a Will filed by or on behalf of the deceased under the Wills Act".[13]

The Application for Search of Wills Notice forms are designed so that the two parts of the registry search process, the application and the response, are combined on the one page form. A solicitor or notary fills out the first part with his or her name, the deceased's name and the deceased's date of birth and death. In response to the application, and on part two of the

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[12]Case #193734, Praecipe, 30 March, 1990.

[13]Rules of Court, 61(31).

form, the director of the Division of Vital Statistics certifies either that "no wills notice has been filed with the Division" or that "the following wills notices are on file with the Division."[14] The response to the Application for Search of Wills Notice in file #193734 shows that four Wills Notices of the deceased were on file. As is the practice with all such applications, photocopies of the Wills Notices are returned to the applicant along with the application and are maintained in the Probate file.[15]

Another notation on the Praecipe in Probate file #193734 requests that the executor determine who the next-of-kin are "under the intestacy portion of the 135 Affid.[sic]." The registrar is referring to the Affidavit required under Section 135 (6) of the Estate Administration Act. In a Section 135 (6) Affidavit, the applicant for probate swears that a Notice of Intent to Apply for Probate has been sent to "everyone who is a beneficiary in the Will, the spouse and the children of the person who died, any common-law spouse, and any separated spouse."[16]

Also included in the inquiry phase is the Affidavit of Executor. There are two Affidavits in Probate file #193734. One is the Affidavit of Executor, in which the executor named in the Will swears to fulfilling the requirements of an executor as they are stated in the Rules of Court and the Estate Administration Act. The document was written on 30 March, 1990. Attached as Exhibit 'B' is the Assets, Liabilities and Distribution sheet. The statement of Assets, Liabilities and Distribution lists the real and personal property of the deceased and its value.

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[14]Application for Search of Wills Notice form, HLTH 532.

[15]Probate #193734, Application for Search of Wills Notice, 23 February 1990.

[16]Constance Mungall, Probate Guide for British Columbia: A Step-by Step Guide to Probating an Estate (North Vancouver, British Columbia: International Self-Counsel Press, Ltd., 1990), 24.

It also lists the deceased's debts and liabilities as well as spelling out the distribution of the estate. The swearing of the Affidavit is attested to by a Commissioner for taking Affidavits within British Columbia. The Commissioner also attests that the statement of Assets, Liabilities and Distribution attached to the Affidavit "is Exhibit 'B' referred to in the Affidavit" of the executor. Also apparent on the Statement is a British Columbia Law Stamp indicating payment for $196.00 for the Probate application dated 8 June, 1990. Currently based upon the gross value of the estate, filing fees for Probate were, at one time, a set rate of $50.00.[17]

Exhibit 'A', referred to in paragraph 2 of the Affidavit as the "deceased's original last Will" is not maintained in the probate file. [18] As indicated in a draft of the Operational Records Classification System (ORCS) for probate files of the Supreme Court of British Columbia, "[w]hen the letter of probate is issued, the Victoria, Vancouver, and New Westminster registries place the original will in a box. When the box is full, it is sent to the Court Records Centre (CRC)."[19]

Peculiarly, as with most of the documents in file #193734, there are two different registry filing date stamps: 14 May, 1990 and 14 June, 1990. It would appear from the examination of the assorted dates of document composition that upon the granting of the Letters Probate the registry stamp may have been set for the wrong month, and when discovered, the documents

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[17]Interview with Doreen Folkestad, Deputy District Registrar, Probate and Bankruptcy Registry, Vancouver Law Courts, 16 July 1993.

[18]Probate file #193734, Affidavit and Statement of Assets, Liabilities and Distribution, 30 March 1990.

[19]Province of British Columbia, Ministry of Attorney General, Court Services Branch, Operational Records Classification System (ORCS) draft, 12 March 1993, primary 51460, section 2, 67.

were stamped again.[20]

The procedure of the granting of Letters of Administration requires a document similar to the Affidavit of the Executor. The Affidavit of Administrator (Administratrix) is also filed with the exhibit document listing assets, liabilities and distribution of the deceased's estate.

In the second Affidavit of file #193734, dated two days earlier on 28 May, 1990, the executor swears to having fulfilled the requirements of Section 135(6) of the Estate Administration Act (i.e., the notification of the beneficiaries of his intention to apply for Probate). The s. 135 Affidavit is supported by an exhibit document. Exhibit "A" filed with this Affidavit is a photocopy of the 'Notice of Intent to Apply for Probate' which has been delivered to the beneficiaries of the estate. Again, the Administration case of #194363 shows that the procedure of granting of Letters of Administration parallels that of Probate, by also requiring an Affidavit in which the administrator or administratrix swears to having fulfilled the requirements of s. 135 of the Estate Administration Act.[21]

Because a beneficiary of the estate in file #194363 is an individual under a disability (an infant), the Office of the Public Trustee was involved.[22] A series of documents in the file

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[20]Estate #193734, Affidavit, 30 March, 1990.

[21]Administration file #194363. The Probate Practice Manual - 1984 includes the "Estate Administration Act, s. 135 Affidavit ... with a copy of the notice attached as Exhibit 'a'" as item (g) in its list of documents required to be filed for adminstration applications (Bogardus, et.al., 6-6).

[22]The term "disability" is used here to refer to *civil* disablility, or *legal* disability, as distinguished from *physical* disablility. It is "[t]he want of legal capability to perform an act," in Black's, revised fourth edition, 548. "The Registrar must check the material to see if there are any infants involved and if so, that the Public Trustee has been served with the application. He is required to be served by Section 22 of the Infants Act and will usually file a letter with the Court stating whether he consents without bond, or will suggest the amount of a bond or some other condition satisfactory to him" (Kowarsky and Stephens, 19).

provides evidence that the rights of the infant as a beneficiary in the estate of the deceased were being assured. One such document is a letter from the Office of the Public Trustee which gives approval for the granting of Letters of Administration subject to the posting of an administration bond for the infant's portion of the estate. Another letter, this time from the applicant's solicitor notifies the Probate Registry of the "lack of objection to Grant of Letters of Administration" by the Public Trustee provided a bond is posted, and gives a date and time for the application for a hearing in Chambers. A note signed by the Deputy District Registrar and stapled to the application Praecipe makes reference to the public trustee's letter requesting the administration bond of $50,000.

File #194363 contains a correction sheet which states the Probate filing fee and identifies one correction required in paragraph 3 of the Affidavit of Administrator for the approval of the application for Administration. The brief annotations in the handling phase on the photocopied Praecipe serve as reminders to Registry staff of the progress of the application rather that directions to the applicant as on the Praecipe preciously mentioned in the probate file #193734.

THE CONSULTATION

The document which initiates the Probate procedure is the Praecipe. The Praecipe, which serves as an application, as indicated in the Rules of Court and probate practice manuals, must be accompanied by several other documents, and these documents as well as the written requests for them illustrate the inquiry phase. Since a large percentage of Probate and Administration Applications do not involve a hearing or trial, evidence of a consultation phase rarely appears in the files of probate in common form. If, however, there is a civil action initiated to

determine the validity of the Will, the actions and documents of the hearing or trial would comprise the consultation phase. The documentary evidence of the action would be maintained in a separate file at the civil registry. Applications for Probate approved in the Vancouver Law Courts are not spoken to in Court and no written Order will appear in the file since none is required. Applications for Administration, however, still must produce a written Order, and can be heard in Court in some instances. Because it involved an infant beneficiary, the Administration application #194363, for example, would have been heard in Court.[23]

THE DELIBERATION

Unlike the probate files discussed above, administration file #194363 contains some documentary evidence of the deliberation phase. Evidence of the final decision-making, as a result of the hearing in Court, appears in the file in the form of a copy of a Court Order, which states that Letters of Administration may be granted to the applicant and that a bond be posted.[24] As mentioned previously, the responsibility for ensuring that all the necessary requirements of the application for Probate or Administration have been fulfilled, in the case of the larger registries, has been delegated to the District Registrar.[25] In the Vancouver and Victoria registries, the Judge or Master merely signs the Chambers Sheet which lists the approved Probate applications. There are, therefore, no documents within the Probate file which represent the actions of the deliberation phase. Instead, evidence of the final approval of an

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[23]Kowarsky and Stephens, 16.

[24]Administration file #194363, Order, 3 August 1990.

[25]Probate file #194268, Letters Probate, 3 July 1990.

application exists on the Chambers List.

THE EXECUTION

Evidence of the execution phase of the procedure of granting of Letters Probate or Letters of Administration will appear within the Probate or Administration files in the form of photocopies of the Letters Probate or Letters of Administration. The originals of these documents are given to the applicants for probate or administration. The Letters Probate Form A used by the Supreme Court of British Columbia states in the text of the document that "the last Will and testament ... was exhibited, read, and proved before a Master of the Supreme Court of British Columbia."[26] Previous discussion has shown that in the larger registries, the Judge or Master no longer views the documents. In diplomatic terms then, the author of Letters Probate is the Supreme Court of British Columbia, the writer is the District Registrar, and the addressee is the Executor or Administrator of the estate.[27]

Form C, used for Letters of Administration does not contain any mention of having been read before a Master or Judge. In file #194363, however, a phrase has been inserted into the text which states that the Grant of Letters of Administration is "[p]ursuant to an Order of this Honourable Court dated the 16th day of July, A.D., 1990."[28]

A note in the secondary classification of 51460-30 for original wills in the draft ORCS previously mentioned states that "[l]egislative amendments expected in 1993 will dissolve the

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[26]Probate #194269, Letters Probate, 3 July 1990.

[27]See glossary for definition of terms.

[28]Probate file #194363, Letters of Administration, 18 September 1990.

Central Probate Registry and no longer require original wills to be removed from the probate file."[29] The effect of the prospective legislation will be that in the future one of the original documents of the inquiry phase of the Probate court procedure will remain within the Probate file.

This chapter has presented an overview of the phases of the procedure for the granting of Letters Probate or Letters of Administration as evidenced primarily from the documents within the probate file maintained at the Probate Registry of the Vancouver Law Courts. The following chapter will present a corresponding analysis of files from the third of the civil registries of the Vancouver Law Courts, the Bankruptcy Registry.

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[29]Province of British Columbia, Ministry of the Attorney General, Court Services Branch, draft ORCS, 12 March 1993, Section 2, 67.

TABLE 2

PROBATE - PHASES AND DOCUMENTS[30]

Initiative	Praecipe
Inquiry	Section 135 Affidavit Will Oath of Administrator Affidavit of Value Correction Sheet Application for Search of Wills Notice Affidavit of Executor/Administrator Atatement of Assets, Liabilities, and Distribution Approval Letter of Office of the Public Trustee
Consultation	N/A
Deliberation	Court Order
Execution	Letters Probate Letters of Administration

[30]Documents listed here are those found in the author's examination of probate case files and discussed in Chapter 2. This does not represent a complete list of documents which may appear in a probate case file.

Chapter 3

Bankruptcy

The laws and rules which regulate the procedures examined in the previous two chapters were provincially initiated and are provincially implemented. Bankruptcy differs from these in that it "is a federal Act which is applied by the courts of the different provinces."[1] The Supreme Court of British Columbia carries out an assigned role within the procedure but had no responsibility for the development of the form of the procedure.

Over the past several decades, the rising number of bankruptcy cases has resulted in an increased records management burden for the registry.[2] However, with the implementation of the amended Bankruptcy and Insolvency Act introduced in the fall of 1992, types of bankruptcies referred to as "summary administration" bankruptcies "will no longer be brought before the courts", nor will the files be maintained at the Bankruptcy Registries of the Supreme Courts of British Columbia.[3] Instead, the offices of Industry Canada, formerly the Department of Consumer and Corporate Affairs, will maintain summary administration bankruptcy files, while

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[1]L.W. Houlden and C.H. Morawetz, Bankruptcy Law of Canada (Toronto: The Carswell Company Limited, 1960), 2.

[2]In 1991, for example, there were a total of 3,574 bankruptcy files initiated in the Bankruptcy Registry of the Vancouver Law Courts. The number of bankruptcies initiated in the first three months of 1992 (944) is greater than the total numbers for each year from 1972 through to 1977 (604, 730, 661, 632, 698, 872). Vancouver Law Courts, Court Registry Activity Quarterly Report, 29 December 1991, and adhoc probate and bankruptcy statistical report produced for the author by the Vancouver Registry, 21 April 1992.

[3]Bankruptcy and Insolvency Act with Draft Regulations 1992, with overview commentary by Frank Bennett (North York, Ontario: CCH Canadian Limited, 1992), 228.

the Provincial registries will continue to hold the files for the remaining categories of bankruptcy and proposal cases. Summary administrations relate to the procedure followed for a bankrupt who "is not a corporation and his or her realizable assets are under $5,000 after payment to secured claims."[4] Under the 1992 legislation, unless the bankrupt's discharge is opposed, discharge is automatic in nine months. 'Ordinary' bankruptcy administration cases, on the other hand, include consumer debtors whose debts exceed $5,000, in addition to corporate bankruptcies.

Implementation of the new rules will result in a change in the composition of bankruptcy files held by the Supreme Court Registry. Over the next several years, with the disposition of semi- and inactive bankruptcy files, the preponderance of summary bankruptcy case files in the custody of the Registry will be replaced by that of case files of "ordinary" bankruptcy procedures. All records examined and then discussed throughout this chapter are from case files selected onsite at the Vancouver Law Courts Bankruptcy Registry. Any summary administration bankruptcies, therefore, will have been initiated under the requirements of the earlier legislation.

Bankruptcy provides a legal means for a debtor to get out of debt.[5] The primary purpose of bankruptcy legislation in Canada has been to provide "a procedure and an administrative system for the collection and distribution of a debtor's assets, the equal distribution of the proceeds among the creditors, and the economic rehabilitation of the debtor.[6] Between 1975

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[4]Bennett, 12.

[5]Dukelow and Nuse, 83.

[6]Continuing Legal Education Society of British Columbia, Bankruptcy - 1984, materials prepared for a Continuing Legal Education interactive audio conference held in various locations throughout British Columbia on April 13 & 14, 1984.

and 1991 there were seven attempts to pass amended bankruptcy legislation.[7] Proclaimed in the fall of 1992, the Bankruptcy and Insolvency Act or Bill C-22 represents a two and one half decade struggle by the legal and financial communities to integrate and reform the "multiplicity of statutes and systems" comprising bankruptcy legislation prior to 1992. The amended legislation reflects a shift in emphasis from bankruptcy to the rehabilitation of the debtor or the reorganization of financially-troubled businesses. In addition, the new Act provides a legal distinction between commercial and consumer Proposals.[8]

Conducting research on the procedure of bankruptcy as it may be viewed by the legal community and court administrators is difficult since there is no equivalent of civil procedural law in the legal study of bankruptcy. Instead, the procedure of bankruptcy is discussed in more practical terms in publications resulting from seminars held by the Continuing Legal Education Society of British Columbia or conferences for administrators and trustees of bankrupt estates. As of 1992, no consolidated manual existed for Registry policy and procedure regarding bankruptcy. However, in September of that year, the Department of Consumer and Corporate Affairs distributed a procedural manual for Supreme Court District Registrars and federal department officials which offers some insight into the order of activities associated with the

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[7]E. Bruce Leonard, "The New Regime for Commercial Reorganizations," in Bankruptcy and Insolvency Act of Canada, materials prepared for a joint conference of the Canadian Insolvency Practitioners Association and the Insolvency Institute of Canada, in co-operation with Continuing Legal Education, held in Vancouver, B.C. on October 5, 1992 (Vancouver: The Continuing Legal Education Society of British Columbia, 1993), 1.01.

[8]Frank Bennett, "Summary of Bill C-22," in Bankruptcy and Insolvency Act with Draft Regulations 1992, with overview commentary by Frank Bennett, 1. A Proposal is "[a] contract with creditors pursuant to the ... Act, approved by the Court, settling liabilities at a reduced amount or extending time for payment" in Bankruptcy - 1984.

processing and managing of bankruptcy cases.

THE INITIATIVE

Procedures which are governed by federal bankruptcy legislation, regulated by the Rules of Court, and result in the generation of files maintained by the Vancouver Law Courts Bankruptcy Registry, may have been initiated in one of three ways. Bankruptcy may be entered into voluntarily or involuntarily. Bankruptcy law also provides a mechanism by which an insolvent person, a receiver, or a liquidator of an insolvent person's property may make a proposal to the creditors with a scheme or an arrangement to repay the debt.[9]

A debtor considering the option of bankruptcy speaks first with a trustee in bankruptcy. With the assistance of the trustee, the debtor makes an Assignment of his or her property to a trustee for the benefit of his or her creditors. Subsequently, the "first formal contact ... with the system" will be with the Official Receiver. The Official Receiver is a federal government employee and an officer of the Court whose duties include accepting the debtor's assignment, appointing the trustee to the estate, setting an estate bond to be filed by the trustee, chairing the first meeting of the creditors and examining the debtor in respect of his or her affairs.[10] The

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[9]"A debtor is a person who receives a loan or an advance of goods and services in exchange for a promise to pay at a later date ... [, and an insolvent person is a] person who is unable to meet financial obligations as they become due. A creditor is a person, institution or business to whom money is owed. Secured creditors are creditors who have taken some measure to protect themselves and hold a mortgage, pledge, lien or similar instrument on, or against, the property of the debtor. If they are not paid, they can enforce their claims by recovering the assets on which they hold security. Unsecured creditors are creditors who do not have any security for the debt owing to them." In Dealing with Debt: a Consumer's Guide, Canada, Minister of Supply and Services Canada, 1993, 8,9.

[10]Bankruptcy - 1984 1.02; Dealing with Debt: a Consumer's Guide, 9.

debtor is effectively bankrupt at the time of the acceptance of an Assignment by the Official Receiver.[11]

A voluntary bankruptcy is initiated when a "debtor makes an assignment of his [or her] property and the assignment is forwarded to the office of the Official Receiver under the Bankruptcy Act where it is filed, the Trustee is appointed and the administration of the estate begins."[12] An Assignment is a one-page form which, according to the document's text, assigns and abandons all property of the debtor to the Trustee appointed by the Official Receiver.[13] Other documents which accompany the Assignment upon filing are the Affidavit of Execution of Assignment, the Statement of Affairs, the Estate Information Summary, the Questionnaire, and, if necessary, company minutes authorizing the Assignment. While these documents may be filed at the same time as the Assignment, they represent activities related to the inquiry phase of the procedure, and are discussed at length in that section of this chapter.

The Assignments in case #144561/92 and #144557/92 are stapled to Statements of Affairs of Non-Business Bankrupt, Affidavits of Execution of Assignment, and Estate Information

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[11]L.W. Holden and C.H. Morawetz, The Annotated Bankruptcy and Insolvency Act 1994 (Scarborough, Ontario: Carswell, 1993), 107.

[12]Ron Twohig, "Introduction and Administrative Framework," in Fundamentals of Bankruptcy Law, Dalhousie Continuing Legal Education Series, No. 6 (Halifax: Faculty of Law, Dalhousie University, 1974) 6. "A trustee in bankruptcy is a person licensed by the Superintendent of Bankruptcy to administer proposals and bankruptcies. The trustee represents ... [the] creditors and is an officer of the court. However, the trustee can give ... [the debtor] information and advice about the proposal and bankruptcy processes and make sure that ... [the debtor's] rights, as well as those of the creditors, are respected." In Dealing with Debt: a Consumer's Guide, 10.

[13]Bankruptcy files #144561/92, Assignment for the General Benefit of Creditors, 6 November 1992. and #144557/92, Assignment for General Benefit of Creditors, 9 November 1992.

Summaries. No Registry date stamp appears on these documents; rather the Assignment and the Statement of Affairs are marked with the stamp of the Official Receiver for Canada's Bankruptcy Act. Forms for Assignments, Affidavits and the Statements of Affairs are among those presented in the Rules of the Bankruptcy Act. Each completed document of this form type is identified with the form number and the section number of the Bankruptcy Act to which the document relates.

Involuntary bankruptcy is usually initiated when "one or more creditors ... file in court a petition for a receiving order against a debtor;" although it will also occur when a proposal made by a debtor to his or her creditors is rejected.[14] Bankruptcy case #146320 is an example of an involuntary bankruptcy, where, on March 10, 1993, a Petition for Receiving Order was filed at the Vancouver Court Registry. The author of the Petition, the petitioner, is in this case one of the creditors. The petitioner's signature and that of the witness appear near the bottom of the document. The document is also signed by the Registrar of Bankruptcy. In diplomatic terms, the registrar is the "countersigner" of the Petition, that is, the person who "assumes responsibility only for the regularity of formation of the document and for its forms."[15]

The date the document was signed by the Registrar as "issued" was March 10, the same as appears on the Registry date stamp. In addition, the Petition is stamped with the Supreme Court Of British Columbia Seal and a receipt stamp indicating the payment of $100.00 for the initiation of this procedure. Accompanying the Petition are other documents such as the Affidavits of Truth of Statements in Petition, the authors of which are the President of the

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[14]Statutes of Canada, 1992, ??, Eliz. 2, c. 27, s. 43(1).

[15]Duranti, "Diplomatics ... (Part III)", 7.

petitioning company and the Senior Vice President of the company acting as trustees to the bankrupt, and a Notice of Hearing. They too are dated and stamped March 10. Evidence that the debtor has received a copy of the Notice of Hearing appears in the file in the form of an Affidavit of Service. The Affidavit of Service, sworn by a Bailiff of the City of Vancouver, states that the partners in the debtor company have been served with the "true copies" of the Petition for Receiving Order, the Affidavits of Truth of Statements in Petition, and Notice of Hearing.[16]

The role of persons involved in the creation of documents of the initiative phase of involuntary bankruptcy differs somewhat from that of voluntary bankruptcy. A voluntary bankruptcy is initiated with the filing of an Assignment at the office of the Official Receiver. The author of the document and of the act is the debtor. The addressee of the document and of the act is the Official Receiver. Involuntary bankruptcy is initiated when a petitioner takes a petition "before the court, which makes a receiving order and the bankruptcy proceedings begin."[17] The author of the document and the act is the petitioner, and the addressee of the document and the act is the Supreme Court.

Case #146320, as noted above, is a bankruptcy case in which an Application for a Receiving Order was filed by the Petitioner. Section 42 of the 1992 legislation states that "[a]t the hearing of the petition, the court shall require proof of the facts alleged in the petition and of the service of the petition, and, if satisfied with the proof, may make a receiving order."[18]

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[16]Bankruptcy file #146320/93, Affidavit of Service, 12 March 1993.

[17]Twohig, 6; A petition for bankruptcy is an "application by a creditor to the Court for a Receiving Order adjudging a debtor bankrupt" (Bankruptcy - 1984, 4).

[18]Statutes of Canada, 1992, c. 27, s. 43 (6).

Such documents of proof appear in the file of bankruptcy case #146320 in the form of the Affidavit of Truth of Statements in Petition sworn by the petitioner and one sworn by the trustee and an Affidavit of Service sworn by a bailiff of the City of Vancouver. As with the Affidavit of Execution of Assignment and the Statement of Affairs filed with the Assignment in a voluntary bankruptcy, documents such as the Affidavit of Truth of Statements in Petition filed with the Application for a Receiving Order are also part of the inquiry phase of the bankruptcy procedure.

On March 19 the first hearing of the petitioner in the case of bankruptcy file #146320/93 results in an adjournment until April 2, 1993. Subsequent to the hearing on that date a Receiving Order is granted. It is signed by the Registrar in Bankruptcy and the "Endorsement on Receiving Order" is signed by the Official Receiver for the Bankruptcy and Insolvency Act. The Receiving Order is the first document in this file to be stamped with the federal stamp of the Official Receiver indicating the date the Order was acknowledged by that office. Also appearing on the Order are the Supreme Court of British Columbia, Vancouver Registry seal and the Registry date stamp of April 6, 1993. With the filing of the Receiving Order, the debtor "is adjudged bankrupt".[19] Activities and documents of the phases subsequent to the inquiry phase of an involuntary bankruptcy mirror those of a voluntary bankruptcy procedure.

"[T]he making of a receiving order against or an assignment by any person except a corporation operates as an application for discharge from bankruptcy."[20] At the close of the inquiry phase in a voluntary or involuntary bankruptcy, the debtor's legal status has been altered

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[19]Bankruptcy file #146320/93, Receiving Order, April 2, 1993.

[20]Bankruptcy -- 1984, 1.10.

to that of a bankrupt and the proper judicial and regulatory bodies have become involved in the administration of the bankruptcy.[21]

The administration of a bankruptcy case may also be initiated by the making of a Proposal.[22] The 1992 amended bankruptcy legislation distinguishes between consumer and commercial Proposals. Both procedures may be initiated with the filing of the Proposal with the trustee or "[i]f the debtor does not have sufficient time to formulate a proposal, ... [with the filing of] a notice of intention to file a proposal directly with the official receiver." A Notice of Intention to File a Proposal allows the debtor up to forty days in which to "organize and prepare" the necessary documents.[23] Failure to file the Proposal and other required documents, or rejection of a Proposal by the creditors or the Court will result in the debtor being declared a bankrupt.

File #145482/VA93 reflects one instance of a Proposal. As with a voluntary bankruptcy, the original of the Estate Information Summary filed with the Official Receiver appears in the Registry file. Accompanying it and bearing the same date are the original Proposal, Statement of Affairs and Notice of Intention to Make a Proposal. The Notice of Intention creates a situation where the creditors of the insolvent person "cease to have any remedy against the debtor or the debtor's property, and no one shall start or continue any action, execution or other

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[21] "'[B]ankrupt' means a person who has made an assignment or against whom a receiving order has been made or the legal status of that person" (Bennett, 15).

[22]"An insolvent person whose debts are less than $75,000, excluding the home mortgage, can make a consumer proposal. Insolvent persons with debts in excess of that amount may qualify to make a proposal under Division I of Part III of the Act" (Dealing with debt: a consumer's guide, 12).

[23]Bennett, 2,3.

proceedings, for the recovery of a claim provable in bankruptcy." With some exceptions, these same restrictions apply upon the filing of a proposal.[24]

THE INQUIRY

As with the probate procedure, documents which represent the inquiry phase or the "collection of the elements necessary to evaluate the situation" are filed at the same time, or with the document which initiates the procedure.[25] The Affidavit of Execution of Assignment, the Estate Information Summary and the Statement of Affairs of Non-Business Bankrupt in summary administration files #144561 and #146540 are documents written by the trustee and filed first with the Official Receiver. The originals were then transferred to the Supreme Court Bankruptcy Registry. The authors of the Affidavits are those swearing to being witnesses to the execution of the assignment and to the age of majority of the debtor. The Estate Information Summary and the Statement of Affairs of Non-Business Bankrupt were written by the trustee, but the author is the bankrupt and he or she is responsible for the accuracy of their contents.[26]

None of the documents show the Registry date stamp which would indicate that they had been filed initially at the Registry. Appearing instead are annotations indicating their receipt by the Official Receiver's office. However, two annotations on the Estate Information Summary

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[24]Consumer and Corporate Affairs, Bankruptcy Branch, "New Procedures Introduced in c. 27, The Bankruptcy and Insolvency Act," September 1992, 6, 11-13.

[25]Duranti, "Diplomatics ... (Part IV)," 14.

[26]Dealing with Debt: a Consumer's Guide, 15; "The filing of an assignment is the act of the party making it" (Holden and Morawetz, 107).

show that the Court registration fees for these original documents have been paid.[27] The Court date stamps vary in both cases from the dates indicating the day and time of filing with the Official Receivers office; and this constitutes further evidence that these documents have been routed through to the Bankruptcy Registry from the Official Receiver's office.

The Statement of Affairs is a "specialized form of financial statement setting out the debtor's assets and liabilities - secured, preferred and unsecured. ... It is sworn to by the debtor and often varies from the Trustee's opinion, particularly regarding values."[28] This list provides the Official Receiver with some of the necessary information enabling him or her to "examine the debtor in respect of his affairs."[29]

Documentation of the inquiry phase of an involuntary bankruptcy is represented by the Affidavit of Truth of Statements in Petition, the Statement of Affairs and the Receiving Order. Involuntary bankruptcies are initiated with the court, rather than the Superintendent of Bankruptcy. The involvement of the Official Receiver or the office of the Superintendent of Bankruptcy, Industry Canada does not occur until the Court has issued a Receiving Order. At that time the bankrupt completes an Estate Information Summary and submits along with it a Statement of Affairs. As with summary administrations, proposals are initiated with the Superintendent of Bankruptcy. The debtor's proposal is submitted with the Estate Information Summary and the Statement of Affairs.

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[27]File #146540/93, Estate Information Summary, 26 March 1993; File # 144561/92, Estate Information Summary, 12 November 1992.

[28]Bankruptcy - 1984, 5.

[29]Ibid., 1.02.

THE CONSULTATION

The meeting of the creditors, the meeting of the inspectors and the examination of the bankrupt by the Official Receiver are actions which constitute the consultation phase in the procedure of bankruptcy. The records of these actions which appear in the court registry bankruptcy case files are the Official Receiver's Report and the Report of Trustee on Bankrupt's Application for Discharge.[30] Instructions to trustees on the legal requirements for the administration of a bankrupt estate provided at a 1974 conference indicate that trustees were not responsible for filing the minutes of the meeting of the creditors and/or inspectors with the Court. Instead, as shown by section 82(3) of the Bankruptcy Act, it is the Official Receiver who must file the minutes "[i]mmediately after the first meeting of the creditors."[31]

The role of the creditors (or inspectors when they are appointed as representatives of all the creditors) in the procedure of bankruptcy is to "provide direction and advice to the trustee regarding specific actions to be taken in the administration of the estate."[32] Trustees may be appointed by the Court, as in the case of an involuntary bankruptcy, or by the Official Receiver in the case of a voluntary bankruptcy. "In both instances, the court and the Official Receiver are required, in the making of the appointment [of a trustee], to have regard to the wishes of the

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[30]Duranti, "Diplomatics ... (Part IV)", 14.

[31]Rod McCulloch, "Practical Problems in the Administration of Bankrupt's Affairs," in Fundamentals of Bankruptcy Law 40; L.W. Houlden and C.H. Morawetz, The Annotated Bankruptcy Act, 1991, (Scarborough, Ontario, A Carswell Publication, 1991), 332.

[32]Consumer and Corporate Affairs, Canada, Inspectors' Handbook, Information Guide for Persons Appointed as Inspectors under the Bankruptcy and Insolvency Act, ([Ottawa: Consumer and Corporate Affairs, 1993]), 3.

creditors."[33]

A trustee is required to present a report of the bankrupt's assets and liabilities at the first meeting of the creditors. Such a report is evident in file #146320\93, an ordinary administration involuntary bankruptcy, which at the time of this writing had not been concluded. The report is referred to in the Minutes of the First Meeting of Creditors as one of the documents tabled for review by the creditors.[34] The first meeting of the creditors also provides an opportunity for the creditors to "vote and either confirm the trustee's appointment, or substitute a trustee of their choice."[35]

Also part of the consultation phase is the examination of the bankrupt by the Official Receiver. An Official Receiver's Report of such an examination appears in the summary administration voluntary bankruptcy file #146540/93. It consists of a sworn statement in which the Official Receiver declares that "on the aforementioned date, the person named herein, appeared before ... [him] for examination pursuant to Section 161 of the Bankruptcy Act, in respect of the bankrupt's conduct, causes of bankruptcy and disposition of property," and the questions and answers of the examination as required by section 161 of the Bankruptcy and Insolvency Act.[36] The examination is attested to by the bankrupt and countersigned by the

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[33]Holden and Morawetz, 1993, 25.

[34]File #146320\93, Minutes of the First Meeting of Creditors, 31 June 1993.

[35]Dealing with debt: a consumer's guide, 15.

[36]"The official receiver shall on the attendance of a bankrupt examine the bankrupt under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property and shall put to him the prescribed question or questions as he may see fit" (Revised Statutes of Canada, 1985, c. B-3, s.(1) in Houlden and Morawetz, 1991, 234).

Official Receiver.[37]

In the case of the proposal of file #145482/VA93, a record of the consultation phase appears in the form of the Report of Trustee on Proposal. Proposals are distributed by the trustee to the creditors who must accept or reject the terms of the Proposal. Once accepted by the requisite majority of creditors, Proposals may be reviewed and approved by the Court. The minutes of the meeting of creditors serve as record of the deliberation phase of the proposal procedure since it is at the meeting that the creditors reach a decision and the outcome of the vote is officially recorded. Minutes of the Reconvened Meeting of Creditors in file #145482 indicate that the Proposal was approved by a majority of the creditors.[38] If the proposal had been rejected by the creditors the debtor would have become a bankrupt and the meeting of creditors transformed into the first meeting of creditors in a bankruptcy.

THE DELIBERATION

As mentioned, the minutes of the meeting of creditors in the case of a Proposal may comprise a record of the deliberation phase of the procedure. Under the former bankruptcy legislation, a meeting of creditors to consider the Proposal was mandatory. The amended Bankruptcy and Insolvency Act requires a meeting of the creditors only if one is requested by

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[37]Bankruptcy file #146540, Official Receiver's Report - Sec. 161, 14 July 1993; The attestation is "the subscription of those who took part in the issuing of the document (author, writer, countersigner) and of witnesses to the enactment or the subscription" (Duranti, "Diplomatics ... (Part V)", 14, 15).

[38]Bankruptcy file #145482/VA93, Report of Trustee on Proposal, 19 April 1993; Minutes of the Meeting of Creditors, 10 March 1993; Minutes of the Reconvened Meeting of Creditors, 6 April 1993.

25 percent of the creditors or the Official Receiver. If no meeting is called the trustee is notified of the acceptance or refusal of the Proposal by registered letter from each creditor.

Again under the former Bankruptcy Act, if after the deliberation by the creditors and the Court the consumer proposal was rejected, the debtor would "be deemed to have made an assignment in bankruptcy and the assignment [would] ... date back to the date on which the proposal was filed with the Official Receiver."[39] At the same time, the meeting of the creditors originally called for the purpose of voting on the Proposal, would be transformed, under s. 80 of the Bankruptcy Act, into the first meeting of the creditors in a bankruptcy procedure.[40] Under the current Bankruptcy and Insolvency Act, the rejection of a Proposal by either the creditors or the Court does not automatically result in bankruptcy for the consumer debtor. Instead, the creditors' rights which were suspended upon the filing of the Notice of Intention to Make a Proposal or upon the filing of a Proposal are revived.

First-time unopposed consumer bankrupts are automatically discharged nine months after the date of bankruptcy. However, in some circumstances, if there is opposition to the discharge by one more creditor, or if the bankrupt has been previously bankrupt, a court hearing is required. As specified by the Court's mandate under the Bankruptcy and Insolvency Act, and based upon information from the documents filed with the court and the evidence presented at the hearing, a Court official may either refuse the discharge from bankruptcy, or may issue an Order of Absolute Discharge, an Order of Conditional Discharge, or an Order of Suspended

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[39]The Continuing Legal Education Society of British Columbia, Bankruptcy - 1984, 1.07.

[40]Ibid., 1.07.

Discharge.[41] Orders which suspend the bankrupt's discharge from bankruptcy appear in three of the voluntary bankruptcy case files examined for this study. The effect of this particular Order is to postpone the discharge from bankruptcy until a specified date. The delay of discharge may be prompted either by the objection of a creditor, trustee or superintendent; an ongoing criminal investigation; or a breach of the bankrupt's duties as specified in the Bankruptcy and Insolvency Act.

The reasons why the discharge of the bankrupt in summary administration #144561 was suspended are clearly stated in the text of the Order. "[T]he discharge of the bankrupt," it states, "shall not be absolutely granted" because "the assets of the bankrupt are not of a value equal to fifty cents in the dollar in the amount of his unsecured liabilities" and "the bankrupt has on a previous occasion been bankrupt."[42] These are just two of the 13 "facts" listed in section 173(1) of the Bankruptcy and Insolvency Act which will result in a conditional discharge from bankruptcy by the Court.[43] The discharge in summary administration case #146540 is similarly suspended for three months because "the bankrupt previously make an assignment into bankruptcy."[44] In the case of summary administration case #144557, the trustee has filed a Notice of Intended Opposition to Discharge of First-Time Bankrupt. As a result, a hearing in

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[41]"The registrars of the courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules, ...to grant orders of discharge" (Bennett, 188).

[42]Bankruptcy file #144561/VA92, Order Suspending Bankrupt's Discharge, 15 September 1993.

[43]Revised Statutes of Canada, 1985, c. B-3, s. 173(1)(a)-(m) in Houlden and Morawetz, 1991, 243.

[44]Bankruptcy case #146540/93, Order Suspending Bankrupt's Discharge, 15 December 1993.

front of the registrar is required and an Order Suspending Bankrupt's Discharge for one month is issued.[45] Again, as with other court orders, only copies appear in the files, the originals being maintained separately by the Court.

DELIBERATION CONTROL

Proposals are a contract between the debtor and the creditors. The decision to accept or reject the terms of the contract in a vote by the creditors represents the deliberation phase of the procedure. In both consumer and commercial Proposals, control over the final decision may be exercised by the Court. Under the current legislation, consumer Proposals are not required to be formally approved by a court hearing. However, the creditors or Official Receiver may request a court review of the Proposal.[46] If this occurs, the trustee obtains a hearing date with the court and submits to the Court a report on the Proposal. The Court may refuse to approve the Proposal; or, as in file #145482, after reviewing the evidence, the Court may find that "no offenses or facts have been proved to justify the Court in withholding its approval."[47] Court approval of a consumer Proposal appears in the form of an Order Approving Proposal.

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[45]Bankruptcy case #144557, Notice of Intended Opposition to Discharge of First-Time Bankrupt, 8 July 1993; Order suspending Bankrupt's Discharge, 13 October 1993.

[46]"Where a consumer proposal is accepted or deemed accepted by the creditors, the administrator shall, if requested by the official receiver or any other interested party within thirty days after the day of acceptance or deemed acceptance, forthwith apply to the court to have the consumer proposal reviewed" (Statutes of Canada, 1992, c. 27, s. 66(22)); In the case of commercial proposals, the Court's approval is required (Statutes of Canada, 1992, c. 27, s. 58).

[47]Bankruptcy file #145482, Order Approving Proposal, 29 April 1993.

THE EXECUTION

Many of the files mentioned in this chapter were examined during the active phase of their lifecycle and, as a result, were incomplete. For this reason, not all the documents which may represent the latter phases of the bankruptcy procedure appear in the files. The execution phase of a voluntary bankruptcy is comprised of the discharge of the bankrupt. If the three voluntary bankruptcy files discussed above were complete, additional documentation of the execution phase would appear in form of the Application of Trustee for Discharge, an accompanying Affidavit and an Order Discharging Trustee. Trustees administrating Proposals are discharged from their responsibilities in the same manner as in a summary administration. Debtors in proposal cases are issued a Certificate of Compliance upon completion of the terms of the proposal. No comparable document is issued to the discharged bankrupt in a summary administration. The court order simply indicates whether the bankrupt's discharge is absolute or will occur within a specified period of time, and at that time the trustee is discharged and the procedure of bankruptcy is concluded.

TABLE 3

BANKRUPTCY - PHASES AND DOCUMENTS[48]

Initiative	Assignment Petition for Receiving Order Notice of Intention to File a Proposal Proposal
Inquiry	Affidavit of Execution of Assignment Estate Information Summary Statement of Affairs Questionnaire Receiving Order
Consultation	Official Receiver's Report Report of Trustee on Bankrupt's Application for Discharge Minutes of the First Meeting of Creditors Report of Trustee on Proposal Minutes of the Reconvened Meeting of Creditors
Deliberation	Minutes of the Meeting of Creditors Order of Absolute Discharge Order of Conditional Discharge Order of Suspended Discharge
Deliberation Control	Order Approving Proposal
Execution	Application of Trustee for Discharge Affidavit Order Discharging Trustee Certificate of Compliance

[48]Documents listed here are those found in the author's examination of civil action case files and discussed in Chapter 1. This does not represent a complete list of documents which may appear in a civil action case file.

CONCLUSIONS

> A legal right is not worth having, indeed it is not worthy of the name, unless an effective procedure exists for enforcing it.
>
> S.M. Waddams, Introduction to the Study of Law

> An understanding of procedures is the key to the understanding of information systems.
>
> Luciana Duranti

As explained by Luciana Duranti, and reiterated by the authors of several archival diplomatic studies which have been recently completed within the last year, special diplomatics involves the application of diplomatic theory to the analysis of specific documents. One of the primary purposes of the studies referred to above has been to test the "relevance of diplomatic principles in a modern context, [and to] suggest ways in which the information gathered through a diplomatic analysis can be usefully applied to North American archives."[1] Testing the significance of diplomatics has, in some cases, involved the adaptation of traditional methodology, while retaining the basic integrity of diplomatic theory. This study too has sought to verify the applicability of diplomatic analysis, this time within a highly structured and bureaucratic context where considerable value has been placed on records management. Where this study differs somewhat from those referred to above is that, due in part to the extent of the records examined, there has been less emphasis on the extrinsic and intrinsic elements of

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[1]Davidson, 2.

individual records or documents, and more emphasis on the role of each document and its corresponding action within a particular phase of a procedure.[2]

What all these studies have in common, however, is the application of special diplomatics to the analysis of modern documents. When diplomatic theory was originally developed, its purpose was to "determine the authenticity of documents."[3] At that time one document captured wholly the documentary evidence of a transaction. But, as Duranti points out, in

> applying diplomatic methodology to modern and contemporary documents, we will find ourselves faced with multilateral relationships, in which each single fact manifests itself in a fragmented documentary form, and each document guides us not only to a small portion of the fact it is about, but, possibly, to a chain of other documents and/or facts.[4]

The preceding three chapters each have presented an analysis of case files from the Supreme Court of British Columbia, Vancouver Law Courts, Civil Registries of civil litigation, probate and bankruptcy. In all three chapters the analysis has identified most of the documents which appeared in the case files at the time they were examined, and these documents and the actions they represent have been located within one of the phases of a civil litigation, probate or bankruptcy procedure, based on the definitions of procedural phases as shown in Luciana Duranti's articles on diplomatics.

In the second of her articles, Duranti discusses the concept of procedure versus that of process, stressing the distinction between the two, as well as the difference between the types

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[2]Duranti, "Diplomatics ... (Part I)," in Archivaria 28 (Summer 1989) 9; Steven Davidson, "The Registration of a Deed of Land in Ontario: A Study in Special Diplomatics,"; Janice Simpson, "Broadcast Archives: A Diplomatic Examination,"; Janet Turner, "Special Diplomatics and the Study of Authority in the United Church of Canada."

[3]Duranti, "Diplomatics ... (Part I)" 17.

[4]Duranti, "Diplomatics ... (Part II)," 15.

of documents they generate. Procedure, she writes, "comprises the formal steps to be undertaken in carrying out a transaction, [and] the documents resulting from it are one with the transaction." Process, on the other hand, is a sequence of informal activities executed prior to, or in preparation for the formal requirements of a procedure. "[D]ocuments resulting from a process," Duranti relates, "are preparatory, incomplete."[5] Defining legal records as "recorded transactions", Duranti further emphasizes that they are a particular type of archival document, the formal result of procedural steps, and not of processes.[6]

An example of this distinction is apparent in some of the probate files examined from the Probate Registry and described in chapter 2. As noted previously, the registrar is responsible for approving the initiating document (the Praecipe) in a probate procedure. If elements in the Praecipe are incorrect or unclear, the registrar notifies the lawyer of necessary corrections by itemizing them on the Praecipe or on a Corrections Sheet, which, after being photocopied, is sent to the lawyer. The photostatic copies of the Praecipe and Corrections Sheet are maintained in the probate file only for the registrar's reference purposes. When a submitted Praecipe is approved by the registrar, it serves as the application for obtaining Letters Probate. Copies of incomplete and unapproved Praecipes can be removed from the file as they, or rather the notations on them are process documents, reminders for the registrar of what had been wrong with the previous Praecipe. More specifically, they are supporting and narrative documents, whose existence is not required, unlike that of the dispositive and probative documents belonging

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[5]Duranti, "Diplomatics ... (Part II)," in Archivaria 29 (Winter 1989-90) 13.

[6]Duranti, "Diplomatics ... (Part II)," in Archivaria, 29 (Winter 1989-90) 12.

in the formal procedures.[7]

In most respects, the manner in which documents are processed and maintained within court registries demonstrates the value the court itself places on particular documents. For example, only photostatic copies of court orders are maintained on the case file, while the originals are maintained separately.[8] Court Orders receive special treatment because they document a direction of the court. A Court Order will always represent the execution phase of a procedure. However, within the conduct of an action or a proceeding, a Court Order may be interlocutory or final, either to resolve an intervening matter or to conclude the action itself.[9] Therefore, obtaining a Court Order may be only one small component within the larger procedure of the lawsuit as a whole.

Some legal documents and the actions they represent always serve a particular function within a court procedure. For example, a Praecipe is an application or a request no matter

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[7]Dispositive documents are those for which "the purpose of the written form [is] to put into existence an act, the effects of which [are] determined by the writing itself." The purpose of probative documents is "to produce evidence of an act which [comes] into existence and [is] complete before being manifested in writing." Both constitute juridical acts. Supporting documents include those "constituting written evidence of an activity which does not result in a juridical act, but is itself juridically relevant." Narrative documents contitute the "written evidence of an activity which is juridically irrelevant," in Duranti, "Diplomatics ... (Part II)," 9-10.

[8]At one time, probate case files contained only photostatic copies of the Will; the original documents were maintained separately as with original Court Orders. Now, however, the original Will remains in the case file.

[9]An order is a "direction of the court on some matter incidental to the main proceeding that adjudicates a preliminary point or directs some step in the proceeding," in John A. Yogis, Canadian Law Dictionary, 2nd edition (Toronto: Barron's Educational Series, Inc., 1990) 162. An interlocutory order is "an order which decides not the cause, but only settles some intervening matter relating to it;" and a final order is "one which either terminates the action itself, or decides some matter litigated by the parties," in Black's, revised 4th edition, 1247.

where or when it occurs within the conduct of a case.[10] However, names or titles of court documents do not necessarily convey specific information about the encompassing procedure in which they play a part. In the analysis of the procedure of an interlocutory proceeding, the Praecipe is a record of the initiative phase of that procedure. If, however, the analysis is of the whole civil proceeding, that same Praecipe is linked to the phase of the lawsuit in which the interlocutory proceeding took place.[11] Although the procedural identity of some types of Court Orders can be inferred simply by the title, in other cases, the phase they are a part of may only be determined by the level or perspective of the procedural analysis.

Nevertheless, in the three procedures discussed in this study, many documents can be linked to a particular phase of the larger procedure, and can be done so simply on the basis of the document's name. A Writ of Summons, for example, is part of the record of the initiative phase of a civil lawsuit because its purpose in the transaction it documents is to summon the defendant of a civil litigation case to the court. Similarly, the Demand for the Discovery of Documents is the record of a specific request, and as such is a document which is only relevant at a certain point or for a certain purpose in the conduct of a case. Many documents developed for the use in probate or bankruptcy procedures also have specific titles which clearly identify the transaction taking place, therefore enabling their placement within a specific phase of the

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[10]"A praecipe is a memo making a request of the court, the registrar or the registry", in Ministry of the Attorney General, Court Services Branch, Civil Documents Processing Manual ([Victoria]: Ministry of Attorney General, 1990) 2-181. For the definition provided in Black's Law Dictionary, fourth edition, see page 22, footnote 52, chapter one, above.

[11]In legal terms, interlocutory is "[s]omething intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." Henry Campbell Black, Black's Law Dictionary, Revised Fourth Edition by the Publisher's Editorial Staff (St. Paul, Minn.: West Publishing Co., 1968) 952.

overall probate court procedure.[12]

Complex modern bureaucracies generate records which are the product of equally complex transactions and procedures, and the network of interrelationships between groups of records is mirrored by a network of interrelated procedures. The relationships can result from procedures containing, or being encompassed by, other procedures, as illustrated by the interlocutory proceeding discussed above. The relationship may also be lateral, that is, to an external procedure occurring semi-independently. An example of the latter sort is found in the legal procedure of the administration of a deceased's estate. As mentioned in chapter 2, probate is a court procedure and only part of a larger legal procedure. If, for example, the validity of the Will is contested, another concurrent court procedure (a civil action) may be initiated to settle the issue. In the analysis of the case files of the Probate registry, this civil proceeding represents the consultation phase of the probate procedure.

Again, however, determining the relationships of procedures depends on the perspective from which they are viewed. For example, from the perspective of the estate lawyer, the probate procedure and the civil proceeding are both phases within the larger procedure of the administration of the client's estate. From the Court's perspective, however, they are treated as separate or parallel procedures: one a civil proceeding with its corresponding file, opened and maintained with others in the civil litigation registry; and the other an application for Letters Probate, with its record maintained in the probate registry. No formal administrative procedure exists at the Vancouver Law Courts which allows for evidence of the relationship between the

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[12]For a list of documents and their place within the phases of a procedure, see the document lists provided at the end of each of the former three chapters.

probate procedure and the civil proceeding to appear in the probate case file.

In the concluding chapter of his diplomatic study of the registration of a deed of land in Ontario, Steven Davidson evaluates the relevance of his work in the context of working with modern documents. He has found that the establishment of a "single coherent procedure" provided "a structural framework for ... the diplomatic analyses of all the documents which participated in that procedure." Davidson further states that information gathered during such a study serves the archival functions of arrangement and description, but that "the most useful aspect of diplomatics with respect to modern documents may be its capacity to determine the procedural context of documents and to identify discrepancies between prescribed procedure and actual practice." Similarly, Dutch archivist Peter Sigmond has written that research into record-creating bureaucratic organizations which incorporates aspects of diplomatics enables archivists "to appraise almost complete archives of certain agencies without even looking into them; and ... [to identify] what is missing and what is to be expected." Heather MacNeil has suggested that Sigmond's approach "illuminates the symbiotic relationship that exists between the contextual realms of provenance and documentation, and demonstrates the constant mediation between process and product inherent in that relationship."[13]

An example of the capacity of the incorporation of diplomatics into archival research to identify discrepancies between the daily administration of procedures and the formal rules and regulations was noted earlier in the Letters Probate Form A used by the Supreme Court of British Columbia. It states in the text of the form that "the last Will and testament ... was

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[13]Peter Sigmond, "Form, Function and Archival Value," in Archivaria 33 (Winter 1991-92) 144; Heather MacNeil, "Weaving Provenancial and Documentary Relations," in Archivaria 34 (Summer 1992) 193.

exhibited, read, and proved before a Master of the Supreme Court of British Columbia," when, in fact, the granting of probate in 'common form' does not require the master or judge to review the documents. Instead, the master or judge signs the Chamber Sheet which lists the probate applications approved in form by the registrar.[14]

As this and the other special diplomatic studies have illustrated, the application of diplomatic principles and methodology assists in the archival functions of arrangement, description and appraisal. However, the establishment of control over the records and the description of procedures at the early stages of the records' continuum also contributes to and supports an understanding of the records at the later stages of the records' life continuum. The practical benefits of diplomatics can also extend to the management of records at the earlier stages. At the time the present study was begun there were no procedural manuals for court clerks and registrars working at Probate and Bankruptcy registries in the province. Public access to case files was provided by manual indices, which, for each registry, were arranged alphabetically by the name of the parties involved, chronologically by the date of the case, and numerically by case number or style of cause. No cross-referencing was provided in the indices for related records in other registries.

With the exception of summary bankruptcy case files which will no longer be maintained at the Supreme Court bankruptcy registries, statistics quoted in the introductory chapter show that demands on the court system are on the increase. For those who work with active and semi-active court records and court procedures, diplomatics can assist and support in the maintenance of court records and in the design and development of registry manuals as well as

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[14]For a detailed discussion of this matter see pp. 42 and 53.

automated systems for case and records management. For example, diplomatics offers a standardized structure for the analysis of procedures; a structure which compares to the stages set out in procedural law but can be readily applied to other legal procedures carried out in the court system such as probate and bankruptcy. The internal analysis of specific procedures can assist with the development and implementation of detailed file classification systems and retention and disposition schedules by providing accurate and standard procedural descriptions. The recognition of records as the documentary result of transactions and procedures, as well as the nature of procedures to be hierarchical and interrelated enables those who work with the records to identify and describe appropriate cross-references to related groups of records. Procedural analysis can offer benefits to case management as well, particularly by establishing a single court procedure and linking both case management and records management activities to the one procedural structure.

Conducting a thorough and complete special diplomatic study of a specific group of records is a relatively time-consuming activity, and therefore, may appear to be beyond the resources of many archival institutions. However, as shown by the above analysis of court records, diplomatic principles are relevant to those who manage and make available records. We may find that it is only a matter of time before student and working archivists, through their continuing discussion and dialogue, begin to acknowledge diplomatic theory's applicability to so many aspects of their work.

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