

CHAPTER TWENTY: PUBLIC COMPLAINT PROCEDURES

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CHAPTER TWENTY: PUBLIC COMPLAINT PROCEDURES

I. REVIEW OF PROVINCIAL COURT AND TRIBUNAL DECISIONS

A. *Introduction*

This chapter will not help solve all problems, legal or otherwise, relating to government, but will provide some information of a very general nature to assist. This section provides general guidelines for dealing with public bodies (e.g., the CRTC, Egg Marketing Board, or a public university). Individuals involved in the judicial review process should consult the following texts:

Mullan, David J., Administrative Law, (Toronto: Irwin Law, 2001).

- Part of the Essentials of Canadian Law series by Irwin Law, this text provides a comprehensive review of administrative law in Canada.

Blake, Sara, Administrative Law in Canada, 4th ed. (Toronto: Butterworths, 2006).

- This text provides a simple and clear review of administrative law.

Brown, Donald, and J. Evans, Judicial Review of Administrative Action in Canada, loose-leaf ed. (Toronto: Canvasback Publishing, 1998).

- This regularly updated three-volume text provides a more detailed review of administrative law.

B. *Governing Legislation and Resources*

1. **Legislation**

Federal Courts Act, R.S.C. 1985, c. F-7.

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241.

2. **Resources**

Mossop, David, Judicial Review: A Lay Person's Guide, 5.2 ed. (Vancouver: Community Legal Assistance Society, 2008).

The Ombudsman of B.C. web site: www.ombudsman.bc.ca.

C. *Step One: Informal Review*

Problems with government agencies can often be resolved through informal communication with that agency. Agencies will often make initial decisions based on misperceptions, without all relevant information. Sometimes the most difficult part of an advocate's job is to locate the person making the decision or someone in a position to review the decision. Before more drastic (and often expensive) avenues are pursued, it is advisable to locate this person and to ensure that they have been provided with all relevant information.

D. Step Two: Formal Review

Most government agencies will have some sort of formal review process. For some agencies it will be difficult to distinguish between formal and informal review, while others will have sophisticated, published processes that closely resemble courtroom procedure. Whatever the problem and whichever government player is involved, it is essential to do some research to get all relevant information before launching a formal appeal. Factors such as cost, location of the hearing, type of submissions heard, and evidence required will all affect the choice of whether or not to pursue a resolution through the formal review process.

Generally speaking, powers of review and the procedures of review are set out in the statutes and regulations that govern a particular tribunal or court. Agencies themselves may assist in the clarification of this process. Many publish handbooks for internal use that are available to the general public through their web sites or in law libraries. Lawyers with experience in the area may also provide valuable insight. Lawyers at the Community Legal Assistance Society can be helpful when dealing with specific problems, especially those dealing with poverty law topics (EI, WCB, Income Assistance).

NOTE: Pay attention to **time limits**. Many worthy cases have been lost because an advocate failed to pay proper attention to limitation periods. Some limitation periods are very short.

E. Step Three: Ombudsman

The procedures created by the B.C. Ombudsman Act, R.S.B.C. 1996, c. 340, furnish an inexpensive means for reviewing decisions and practices of **provincial** government bodies. At present, there is no federal equivalent of the provincial Ombudsman. However, as discussed later in the chapter, there are sectional equivalents in such fields as police enforcement and official languages.

The Act has the following main features:

- The Ombudsman is empowered to investigate complaints against public sector bodies including provincial ministries, provincially appointed boards, commissions, Crown corporations and any other public institution where the majority of the board is appointed by the provincial government or is responsible to the government.
- Sections 10 to 17 of the Schedule to the Ombudsman Act empower the Ombudsman to investigate complaints against provincial corporations, municipalities and regional districts, universities and colleges, hospitals and governing bodies of professional or occupational associations established by a provincial Act.
- The Ombudsman does **not** have jurisdiction to investigate complaints in areas where the parties are private actors or where other specialized complaints procedures have been established. Examples include complaints regarding banks, private life and health insurance, consumer inquiries, doctors, employment issues involving private companies, federal programs, landlord and tenant (residential) inquiries, municipal police, and the RCMP.
- The Ombudsman has broad powers of inquiry and may make recommendations, but has no power to enforce recommendations.
- The complainant must exhaust review or appeal procedures within the agency against which the complaint was made **before** turning to the Ombudsman.
- The Ombudsman tables an Annual Report in the Legislature and is empowered to publicly disclose any findings in the event of non-compliance with his or her recommendations by the agency concerned.

Contact the current Ombudsman, Kim Carter, at:

The Ombudsman

Second Floor - 756 Fort Street
Victoria, B.C. V8V 3K3
Mail: PO Box 9039 STN PROV GOVT
Victoria, BC V8W 9A5

Telephone: (250) 387-5855
Toll-free: 1-800-567-3247
Fax: (250) 387-0198
Website: www.ombudsman.bc.ca

F. Step Four: Judicial Review

Where a client is dissatisfied with the result of an appeal within a government-related agency, or with the appeal process itself, that person may have recourse to the courts. Sometimes regulations give an individual a right to appeal directly to the courts. When this is the case, an individual should use this direct right to appeal rather than the general judicial review procedure. Even where there exists no express statutory right to appeal to the courts, superior courts possess inherent jurisdiction to review administrative action – to ensure that it does not exceed the authority granted by statute to the administrative decision-maker.

The courts have developed criteria against which to assess the adequacy of the decision-making procedures of government agencies. These criteria form the heart of administrative law. It is not within the scope of this section to attempt a comprehensive overview of the basic principles of administrative law. Interested parties can find an excellent introduction to these fundamental principles in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Bastarache and Lebel JJ. for the majority provide the following description:

As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law... By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes [paragraphs 27-28].

Remember that judicial review is the fourth step, and should not be contemplated unless all other avenues have been exhausted.

1. B.C. Judicial Review Procedure Act

For matters within the jurisdiction of the B.C. Legislature, the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPCA], provides for the judicial review of the “exercise, refusal to exercise, or purported exercise of a statutory power” (JRPCA, s. 2). This includes the power to review decisions “deciding or prescribing (i.) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or (ii.) the eligibility of a person to receive or to continue to receive, a benefit or license...” (JRPCA, s. 1). In a proceeding under the JRPCA, the court has broad powers to craft a suitable remedy; most often the case will be returned to the tribunal for reconsideration in light of the court’s findings of law or fact (see **Section I.F.4: Available Remedies**, below). An application under the JRPCA can be brought before a Supreme Court Judge in Chambers. Although this is a less expensive procedure than a trial, it may still be beyond the means of most clients.

2. Judicial Review Procedure

A party applying for judicial review must first determine whether the Federal Court or a Provincial Superior Court has authority to decide on the matter. As a general rule, provincial jurisdiction includes tribunals established within provincial constitutional jurisdiction and tribunals created by the province due to a delegation of powers by the federal government.

a) *Federal Court*

When considering judicial review of federal tribunals, it is important to consider both the Federal Courts Act, R.S.C. 1985, c. F-7 and the particular tribunal's governing statute. Often the governing statute sets out important limitation periods and procedures.

The Federal Court Trial Division hears reviews of federal tribunals, with the exception of the 15 tribunals listed in s. 28 of the Federal Courts Act, which are reviewed by the Federal Court of Appeal. The procedures for a federal judicial review are set out in s. 18.1 of the Federal Courts Act. There is a 30-day limitation period for applications to the Federal Court, which can be extended (under s. 18.1(2)). Examples of federal tribunals that are reviewed by the Federal Court of Appeal include: Canada Industrial Relations Board, Employment Insurance Umpires, the Competition Tribunal, and the CRTC. Most other federal tribunals are reviewed by the Federal Court Trial Division.

b) *Provincial Superior Courts*

A tribunal under provincial jurisdiction can be reviewed upon application to a provincial superior court. An application for judicial review in B.C. is made to a single judge in the B.C.. The procedural rules are described in the B.C. Supreme Court Rules, B.C. Reg. 221/90, available in the Practice and Procedure section of the BC Supreme Court website at: www.courts.gov.bc.ca/supreme_court.

Tribunals that can be reviewed under the JRPA include the Employment and Assistance Appeal Tribunal, the Workers' Compensation Board, the Residential Tenancy Tribunal, etc.

c) *Standing*

In general, only the parties who had standing before the tribunal or who are directly affected by the tribunal's decision may apply for judicial review.

d) *Time Limits*

The time limit for application of judicial review to the Federal Court under s. 18.1 of the Federal Courts Act is **30 days**, although it can be extended by the Federal Court (s.18.2(2)). However, other federal legislation may direct different timelines, e.g. with respect to decisions made pursuant to the Immigration and Refugee Protection Act, S.C. 2001 c. 27, appellants must look to both that statute and the Federal Courts Act.

For provincial tribunals, applicants must refer to the Administrative Tribunals Act [ATA], S.B.C. 2004, c. 45 and the specific statute governing the tribunal; **60 days** is the default (ATA s.57). Limitation periods may be extended pursuant to s. 11 of the JRPA, provided another enactment does not provide otherwise and the delay will not result in substantial prejudice or hardship to any other person affected.

e) Stay of Orders or Proceedings

While an application is pending, an order from a tribunal must be obeyed and the proceedings may continue at the tribunal's discretion. However, an applicant may apply to the court for an order to stay the tribunal order or to prohibit the proceedings from continuing.

f) Evidence

The primary evidence for judicial review is the tribunal's record of the hearing. Generally, the court does not allow new evidence to be introduced at a judicial review hearing.

g) Filing Fees and Indigency Applications

Applicants who cannot afford the filing fees for Judicial Review may apply for an indigency order pursuant to Appendix C, Schedule 1 of the B.C. Supreme Court Rules. Indigency status affords the applicant relief from all court fees, and is available to those with low income and limited earning potential.

3. Scope of Judicial Review

Assuming a party can resort to the courts to review the decision of a tribunal, there are limitations as to the scope of judicial review.

a) Substantive Errors

An administrative body has only such power as is granted to it by statute. This grant of authority is limited in terms of the context in which it can be applied, and the manner in which it can be applied. If an administrative decision-maker exceeds his or her authority the court can step in to provide a remedy.

(1) Errors of Fact

Findings of fact are generally reviewable only if they are not supported on the evidence. The deference granted by the court to a tribunal's findings of fact in judicial review is akin to the deference an appeal court shows to a trial court's finding of fact. Nevertheless, it cannot be assumed that the legislature intended to give an administrative body the authority to act arbitrarily or capriciously. If the tribunal makes a finding of fact that cannot reasonably be drawn from the evidence, then it is exceeding the authority granted to it, and its decision can be set aside by the court.

(2) Errors of Law

Substantive areas of law reviewable by the courts can be divided into two areas: statutory interpretation related to the powers of a tribunal, and interpretation related to other broader questions of law.

A tribunal can be overruled if it is acting without authority. A tribunal must, generally, act within the jurisdiction of the legislation that created it. Similarly, a tribunal must not misinterpret the rules that govern the way it exercises authority, since these procedures represent a precondition to the exercise of that authority. The mandate of a tribunal is defined in large

part by the intention of the legislature. If in the course of exercising its authority a tribunal misinterprets its mandate, upon judicial review, a court may declare the tribunal's decision void.

Similarly, a tribunal can be overruled if it applies the law incorrectly in other contexts. The enabling statute creating a given tribunal cannot grant it the authority to act illegally or to change the law.

(3) Standards of Review

Different standards of review may be imposed depending on the issue that is under review and the nature of the tribunal. The law relating to standards of review is quite complicated, thus for a more detailed discussion of the issues pertaining to the standards of review one should refer to *Dunsmuir*, above. See also the ATA for statutorily prescribed standards of review applicable to certain provincial tribunals.

Generally speaking, for questions of law that go beyond the tribunal's specialized area of expertise, the standard of review will be **correctness** – i.e. the tribunal must get the law “right”.

If a tribunal is interpreting its own enabling statute or a closely related statute with which it has particular familiarity or expertise (e.g. the Workers' Compensation Board applying the Workers Compensation Act), then the court will generally show some deference to the tribunal's interpretation. The standard of review will generally be **reasonableness**.

Likewise, for questions of fact, and for exercises of discretion (e.g. with respect to the appropriate remedy) the court will usually show deference to the judgement of the administrative decision-maker who saw the evidence first-hand. The standard of review will generally be **reasonableness**. A court does not usually review a tribunal's discretionary decisions unless such discretion was not exercised in good faith, was exercised for an improper purpose, was based on irrelevant considerations, or was otherwise unreasonable. The appropriate degree of deference depends on a number of factors, including the nature of the discretionary decision, the knowledge and expertise of the decision maker, and the amount of discretion that is given by legislation. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 [*Baker*] and *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] SCC 1 (for Charter violations).

A third, more deferential standard of review, patent unreasonableness, used to be applied in some circumstances. However, *Dunsmuir* has expressly done away with this standard of review – at least in the context of the common law. It is unclear at this time how *Dunsmuir* may have impacted the standards of review dictated by the ATA (which still makes reference to “patently unreasonable” findings).

For a complete picture of the current state of the law with respect to standards of review, see *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12; it states that a “legislature has the power to specify a standard of review if it manifests a clear intention to do so. However, where the legislative language permits, the court (a) will not interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to

grant or withhold relief based in part on *Dunsmuir* including a restrained approach to judicial intervention in administrative matters.”

b) Procedural Areas of Law

Generally, tribunals must follow procedural norms, although they may be less formal than those of a court. Tribunals must follow any procedures required by statute or regulation. However, the legislation is often largely silent on procedural requirements and tribunals are often given a wide discretion within which to operate. Nevertheless, the superior courts are constitutionally bound to uphold the rule of law and will not allow procedural laxity to result in unreasonable prejudice to those affected by administrative decisions. That is, it is presumed that the legislature intended that the administrative body’s authority be exercised only on precondition that certain procedural fairness minimums are followed.

The content of the mandatory procedural fairness minimum will differ depending on the circumstances See *Baker*, above. Determining the precise procedural requirements of a given case is rarely clear cut, and an extensive body of case law exists addressing these issues in various contexts.

Fundamental procedural rights include: the right to know the case that must be met and to respond; and the right to an impartial decision-maker. Other possible candidates for the content of the procedural fairness requirement in a given situation include: the right to advanced notice; the right to an oral hearing; the right to be represented by counsel; the right to formal written reasons etc. In all cases the prejudice to the accused by denying a procedural norm must be balanced against the need to make administrative decisions efficiently.

(1) Standard of Review

Generally, the tribunal’s procedural decisions will be assessed on a standard of “**fairness**”. The court will show deference to the discretionary choice of procedures chosen by the administrative body, provided that the selection is fair in the circumstances. See e.g. *Baker*, above.

For provincial tribunals to which the ATA applies, the Act provides: “questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted **fairly**” (ss .58(2)(b) and 59(5)).

(2) Duty to Act Fairly

Tribunals under common law have a “duty to act fairly”. At its most basic level, the doctrine of fairness requires that a party be given the opportunity to respond to the case against him or her. The circumstances determine whether this hearing is a written objection or a full oral hearing. As a corollary to the right to present one’s case, the legal maxim that only the people who hear the case may decide on it, applies to tribunals. The tribunal must meet quorum but need not be unanimous.

The extent of disclosure depends on what is “fair” to all parties involved and whether the information at issue is prejudicial to an individual’s interests (i.e. failure to disclose inconsequential information may not be fatal). At the very least, a party must know which incidents and allegations will be at issue when the decision is made.

The courts will allow tribunals considerable latitude in establishing procedures (while keeping in mind what is fair). However, a tribunal is required to be procedurally consistent. Where a tribunal informs an individual that a certain procedure will be followed, it will normally be considered unfair to follow a different procedure.

Although many statutes have limitation periods, even where there is no limitation period, any delay in holding a hearing must be within “reasonable” limits. No one has the “right” to an adjournment, however, tribunals should consider the amount of notice, the gravity of the consequences of the hearing, the degree of disclosure, and the availability of counsel when deciding whether to allow an adjournment.

(3) Right to be Heard

If a hearing is provided, a party is entitled to be present while evidence or submissions are presented. The right to be present at a hearing normally includes a party’s right to appear with counsel and his or her right to an interpreter, though normally a tribunal is not required to pay for these services. The tribunal has discretion as to whether the hearing is public or private (although there is a presumption in favour of public hearings). At any hearing, the tribunal must gather and weigh evidence. Relevance is the primary consideration when determining admissibility. Not all administrative decisions involve an oral hearing. A tribunal may have the power to make certain decisions on the basis of written submissions.

(4) Onus of Proof

The onus of proof is normally to a civil standard, i.e. that the events alleged occurred on a balance of probabilities. However, disciplinary hearings may be to a mixed standard requiring proof beyond a reasonable doubt for some elements.

(5) Duty to Act in Good Faith

All decision makers are expected to act in good faith and not to discriminate on the basis of irrelevant criteria. Parties are entitled to a decision made by persons untainted by the appearance of bias or conflicts of interest. A tribunal has a duty to at least consider exercising any discretion it may have.

4. Remedies of Judicial Review

Several remedies are available through judicial review:

- a) an order in the nature of *mandamus* that requires a tribunal to exercise certain powers;
- b) an order in the nature of *prohibition* that prohibits a tribunal from exercising unlawful authority;
- c) an order in the nature of *certiorari* that quashes a tribunal decision;
- d) where there is an exercise, refusal to exercise, or a proposed or purported exercise of a statutory power, an injunction or declaration from the court; or

- e) a court-issued declaration to clarify the law.

A party may also challenge a tribunal decision via a civil action for a declaration or injunction. For non-statutory tribunals, this is the only method of challenge. This is also the only method of challenge wherein the court may grant damages.

II. PRIVACY OR ACCESS TO INFORMATION

A. *Introduction*

Although the right to privacy is fundamental to the healthy exercise of democratic rights, recognition and practical enforcement of this right by legislators and the courts has been slow. This problem has many sources, but underlying it is the enormous difficulty jurists have found in coming to an understanding of what is meant and entailed by this right.

The right to privacy is often balanced against the right to access information since these rights frequently collide (e.g. when an employer wishes to obtain information about an employee from a government agency). In some cases, a right of access to information may determine whether or not an individual's privacy has been violated. Legislation regulating access to government information is designed to ensure an informed citizenry; where information is sought which may injure the privacy interests of a third party; mechanisms exist to weigh privacy interests of the individual against the public interest in disclosure. The following provides a quick survey of the relevant privacy or access to information laws.

B. *Governing Legislation and Resources*

1. **Legislation**

Access to Information Act, R.S.C. 1985, c. A-1.

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

Privacy Act, R.S.B.C. 1996, c. 373.

Privacy Act, R.S.C. 1985, c. P-21.

NOTE: In May of 2010, the B.C. legislature released the Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act [Report]. The Special Committee reiterated the call for public bodies to adopt the practice of routine proactive disclosure of electronic records, made by the two previous statutory review committees. Other recommendations focused on more timely and efficient disclosure of information requests, appointing a Governor Chief Privacy Officer, and giving the Privacy Commissioner expanded powers. For details, see the Report at: <http://www.leg.bc.ca/cmt/39thparl/session-2/foi/index.htm>.

2. **Resources**

B.C. Civil Liberties Association

550 – 1188 West Georgia Street
Vancouver, British Columbia, V6E 4A2
Website: www.bccla.org

Phone: 604.687.2919
Fax: 604.687.3045
E-mail: info@bccla.org

Office of the Information and Privacy Commissioner for B.C.

P.O. Box 9038, Stn. Prov. Govt.
Victoria, B.C. V8W 9A4

1-800-663-7867 (Enquiry B.C.)
Website: www.oipc.bc.org

Privacy Commissioner of Canada
112 Kent Street
Place de Ville, Tower B, 3rd Floor
Ottawa, Ontario K1A 1H3
Website: www.privcom.gc.ca

Telephone: 1-800-282-1376
Fax: (613) 947-6850
E-mail: info@privcom.gc.ca

C. At Common Law

At common law, the torts of trespass, nuisance, defamation, and invasion of privacy may discourage some of the more blatant forms of invasion of privacy. However, these civil actions do not so much ensure privacy as retroactively provide compensation for its breach.

D. Wiretap Legislation

Under s. 184 of the Criminal Code, subject to the exceptions stated therein, it is an indictable offence for anyone to intercept, by means of an electromagnetic, acoustic, mechanical or other device, a private communication without the consent of at least **one** of the parties to the conversation. Police must obtain judicial authorization to covertly monitor telephone conversations or other oral communications. There is a provision (s. 196) for notification of the person under wiretap surveillance within 90 days of the expiration of the authorization period, but such notice may be waived in certain circumstances.

The Supreme Court of Canada has ruled that police may not circumvent the need to obtain judicial authorization by being one of the parties to the conversation (see *R. v. Duarte*, [1990] S.C.J. No. 2). The case law in this area is very complicated, and an experienced criminal lawyer should be consulted if issues regarding a wiretap arise.

E. "Lawful Access" Bill

In June 2009, Bill C-46, *Investigative Powers for the 21st Century Act* and Bill C-47, *Technical Assistance for Law Enforcement in the 21st Century Act* were tabled. Bill C-46 would provide additional investigative powers to law enforcement to deal with computer crime and new technologies. Bill C-47 would allow police and government agents to demand basic subscriber data from telecommunication and Internet service providers without a warrant.

In December 2009, Bills C-46 and 47 died on the Order Paper. Work on the joint submission continues in anticipation of the re-introduction of the Bills, or comparable Bills, in the near future.

F. Federal Privacy Act, Federal Access to Information Act

1. Introduction

The Federal Access to Information Act, R.S.C. 1985, c. A-1 and the Federal Privacy Act, R.S.C. 1985, c. P-21 both deal with freedom of information. The Access to Information Act allows for access to information in records under the control of federal government institutions. The Privacy Act protects the confidentiality of information about an individual held by federal government institutions, and provides individuals with a right of access to information about themselves held by such institutions. What follows is only a brief outline

of the main provisions of these Acts. Students are cautioned to consult the Acts themselves if they have a problem in this area.

2. Access to Information Act

This Act gives a Canadian citizen or permanent resident the right to access any record under the control of a federal government institution. Certain classes of information are exempt from the Act. These include confidential inter-governmental communications, information pertaining to law enforcement and investigations, trade secrets, personal information, and generally anything likely to be harmful to Canada's security interest.

NOTE: In a recent Supreme Court of Canada decision *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] SCC 23, the court held that the guarantee of freedom of expression under s. 2(b) of the Charter does not guarantee access to *all* documents in government hands. In that case, the court adopted the test for whether freedom of expression was infringed found in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 and determined that freedom of expression was not infringed by the Freedom of Information and Protection of Privacy Act, R.S.O. 1990. See both these cases for more detailed information.

The procedure for obtaining a government record is as follows:

- a) Go to <http://canada.justice.gc.ca/eng/pi/atip-airp/use-uti.html> for the Access to Information and Privacy website, which offers a brochure about using the Act, online access to Info Source, and online forms. Alternatively, you can go to any public library and obtain the same information. Info Source is a directory that describes each federal government institution and the information it holds, as well as the title and address of the appropriate officer to whom requests should be sent.
- b) Formally request the records by sending in the online or printed request forms, or by sending a letter. Be as specific as possible citing subject, dates, events, and individuals. Enclose a \$5.00 payment, but ask that this and any other fees be waived on the grounds that the release of records would be of "general public benefit" or that similar information has been released in the past. Always insist on an estimate of any costs involved. There is no fee when someone is requesting their own personal information.
- c) Once the institution receives a request, it has 30 days to give notice of whether access will be given. Senior officials can extend this time limit if they give notice of extension. If third parties are involved, the time limit is 80 days. If access is refused, they must inform the person making the request of the right to make a complaint to the Information Commissioner.

NOTE: It can take up to one year to receive records to which access is given. There is no meaningful redress for delays of this nature.

- d) Complaints should be sent to:

Information Commissioner of Canada

Place de Ville, Tower B
112 Kent Street
Third Floor
Ottawa, Ontario K1A 1H3

Toll-free: 1-800-267-0441
Fax: (613) 947-7294
E-mail: general@infocom.gc.ca
Website: www.infocom.gc.ca

The Information Commissioner investigates complaints in private, and each party has the right to make representations. Similar to an Ombudsman, the Commissioner can

only make recommendations, and cannot directly compel the release of information. However, he or she can take the institution to Federal Court to compel the release of the information. The Commissioner is not obligated to take on a case, and if he or she refuses to do so, there is no right to appeal this refusal.

- e) There is however a right to appeal the original denial of access; this appeal must be made to the Federal Court within 45 days of the decision of the Information Commissioner (s.41). In court, the burden of proof is on the government to show that the information must be withheld.

NOTE: In the Freedom of Information audit, commissioned by the Canadian Newspaper Association, the B.C. Government was the second worst province in Canada for responding to Freedom of Information requests. Ontario was the worst.

3. Privacy Act

The Privacy Act, R.S.C. 1985, c. P-21 sets out the conditions under which a government institution may collect, maintain, and use personal information about individuals. The Act requires that:

- a) the information must relate directly to an operating program or activity of the institution (s. 4);
- b) information used in a decision-making process that directly affects the individual should be, wherever possible, collected directly from the individual to whom it relates, or with his or her consent, and the institution shall inform the individual of the purpose for which the information is being collected (s. 5);
- c) the institution shall ensure that information used to make a decision about an individual is accurate, up-to-date and as complete as possible, that it is retained long enough for the individual to have a reasonable opportunity to obtain access to it, and that it is disposed of in accordance with the relevant regulations and ministry directives or guidelines (s. 6); and
- d) the information shall not, without the consent of the individual, be used for any purpose except that for which it was obtained, for a use consistent with that purpose, or for other purposes specified in the Act (s. 7).

The Privacy Commissioner is authorized to oversee compliance by Federal Government institutions with the provisions of the Privacy Act. The Commissioner receives and investigates complaints from individuals, audits institutions' storage and use of information, makes recommendations to institutions and the Treasury Board regarding privacy issues, and presents an annual report to Parliament.

The Commissioner cannot make orders requiring bodies to comply with the Act, but may investigate and make reports. Individuals who are refused access to their own personal information may, after the Commissioner has investigated and reported, apply to Federal Court for an order requiring access to this information. The Privacy Commissioner may also take enforcement proceedings in Federal Court in relation to refusal to give an individual access to his or her own personal information. For further information contact:

The Privacy Commissioner of Canada
112 Kent Street
Ottawa, Ontario K1A 1H3
Website: www.privcom.gc.ca

Telephone: 1-800-282-1376
Fax: (613) 947-6850

G. Federal Personal Information Protection and Electronic Documents Act

1. Introduction

The federal Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 [PIPEDA] is intended to remedy some of the problems encountered by consumers and by businesses when information relating to consumer habits is collected to be used internally or externally by private sector organizations. While it is a federal act, the legislation claims to have jurisdiction over the provincially regulated private sector as well as the federal sector. This remains to be challenged in court. However, the issue has become academic as almost all provinces have enacted their own version of the Act. In October 2003, B.C. passed the Personal Information Protection Act, S.B.C. 2003, c. 63 [PIPA], discussed below. PIPEDA is a federal law governing:

- a) the collection, protection and disclosure of personal information; and
- b) the use of electronic versions of official documents on paper, in the public and private sphere.

Section 26(2) of the Act gives the Governor-in-Council the power to exempt an organization where substantially similar provincial legislation exists. British Columbia's PIPA has been declared such substantially similar legislation.

For more information on this Act, please see: Perrin, Stephanie et al., The Personal Information Protection and Electronic Documents Act: An Annotated Guide, (Toronto: Irwin Law, 2001).

H. B.C. Personal Information Protection Act

The B.C. PIPA is an attempt by the province to maintain jurisdiction over the regulation of private business, historically under its control. The purpose of this Act is to govern the collection, use and disclosure of personal information by **private** organizations. The Act has been in force since 2004 and has been declared substantially similar by the Governor-in-Council, thereby exempting organizations in British Columbia to which PIPA applies from application of the federal PIPEDA.

I. B.C. Freedom of Information and Protection of Privacy Act

1. Introduction

The Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 [FIPPA] is similar in some respects to the federal access and privacy legislation relating to **public** organizations. As a result of this provincial legislation, there is a consistent policy regarding access and privacy for B.C. government ministries and agencies. The Act is significant for two reasons:

- a) It has standardized decision-making criteria in regards to access and privacy; and
- b) it has established a uniform appeal process.

This Act is amended from time to time. It is advisable to consult the Act for certainty when advising a client. Further information about the Act can be obtained from the:

Freedom of Information and Privacy Association

103 - 1093 West Broadway
Vancouver, B.C. V6H 1E2

Telephone: (604) 739-9788
Web site: <http://fipa.bc.ca/home/>

Also, the B.C. Civil Liberties Association has published a handbook on privacy that provides detailed information about various aspects of the law relating to privacy. It can be found online at www.bccla.org/privacy/privacycontents.html.

2. Scope of Freedom of Information Rights

Section 3 of the FIPPA, provides that the Act applies to all records in the custody or control of a “public body” or a “local public body”, (with notable exceptions in ss. 3(1)(a) to (i)). In addition to “ministries, branches and offices of the government of B.C.” (per the Schedule 1 definition of “public body”), and municipalities, hospitals, universities, colleges, and school boards (per Schedule 1 definition of “local public body”), Schedule 2 lists specific organizations that are covered by the Act, including B.C. Hydro, the B.C. Police Commission, I.C.B.C., Legal Services Society, Mental Health Act Assessment Committees, and the Workers’ Compensation Board.

In July 1993, an amendment to the FIPPA expanded the scope of the legislation to include governing bodies of various professions within the scope of the Act. These professions include lawyers, accountants, engineers, teachers, doctors and nurses (see Schedule 3).

Sections 12 - 22 restrict the disclosure of information. The following may **not** need to be disclosed:

- a) cabinet confidences and local public body confidences (s. 12);
- b) policy-oriented information (s. 13);
- c) legal advice (s. 14);
- d) information harmful to law enforcement (s. 15);
- e) matters under negotiation (s. 16);
- f) financially sensitive data (s. 17);
- g) information harmful to safety (s. 19);
- h) information harmful to a third party’s personal privacy (s. 22); and
- i) confidential third-party business information (s. 21).

It is worth noting that some of the exceptions are mandatory (ss. 21 and 22 on third-party business) and others discretionary (ss. 13 – 19). There is also a public-interest override in s. 25, which requires disclosure of information about risk of significant harm to the environment, or public health or safety, or in other circumstances where disclosure is clearly in the public interest.

NOTE: In *Reference re: South Coast BC Transportation Authority* [2009] BC I.P.C., it was decided that Translink was a public body. Thus, public disclosure of employment records for Translink employees would not be an unreasonable invasion of third party privacy. However this was based on a rebuttal of the presumption that a disclosure of personal information is an unreasonable invasion of a third party’s personal privacy if the personal information describes the third party’s finances, income, etc. A change of circumstances could change the outcome. In *Greater Vancouver*

Transportation Authority v. Canadian Federation of Students – British Columbia Component [2009] 2 S.C.R. 295, Translink was found to be a government entity under s. 32 of the Charter of Rights and Freedoms [Charter], and thus subject to Charter scrutiny.

3. Scope of Privacy Rights

Apart from allowing for access to information, the FIPPA also has provisions restricting the collection, protection, and retention of personal information.

“Personal information” is defined in Schedule 1 of the Act as all recorded information about an identifiable individual other than contact information. The recorded information includes the individual’s name, race, colour, religious or political beliefs, age, sex, sexual orientation, marital status, fingerprints, blood type, health care history, educational, financial, criminal or employment history, anyone’s opinion about the individual, and the individual’s personal views or opinions, except if they are about someone else.

Public bodies can collect personal information only when authorized by legislation, for law enforcement purposes, or when necessary to the operation of a program administered by the public body (s. 26).

In general, a public body must collect personal information directly from the individual (s. 27). Notable exceptions include: when an alternative method is authorized by the individual, the Privacy Commissioner, or under another statute; and when the information is used for the purpose of collecting a debt or fine or making a payment. Except where the information is collected for law enforcement purposes, the public body must also tell the individual from whom it collects personal information the purpose and the legal authority for collecting it.

The public body has a duty to ensure the information it collects is accurate (s. 28). An individual has the right to request correction if he or she believes there is an omission or error in the personal information (s. 29).

Heads of public bodies must protect personal information by requiring reasonable security arrangements against unauthorized access, collection, use, disclosure, or disposal (s. 30). Public bodies must ensure that information in their custody is stored only in Canada and accessed only in Canada unless an individual consents otherwise, or the disclosure is allowed under the Act (s. 30.1).

Employees of a public body must notify the minister when a foreign demand for disclosure is requested (s. 30.2). Section 30.3 provides whistleblower legislation to protect employees fulfilling this obligation.

Public bodies that use an individual’s personal information to make decisions that directly affect the individual must retain that information for at least one year after using it, so that the individual has an opportunity to obtain it (s. 31). Further, a public body can only use personal information for the purpose for which that information was obtained, or for a use consistent with that purpose (s. 32).

Sections 33 to 36 deal with disclosure of personal information by a public body. These sections empower a public body to disclose personal information only under certain circumstances, such as where there is consent of the individual; where the information is used for a consistent purpose or for the purpose of complying with another enactment; where the information is used for collecting a debt, payment or fine owing by the individual to the provincial government or a public body; where the information is used in an audit; and where the information is used by a public body or a law enforcement agency to assist in an investigation in which a law enforcement proceeding is intended or likely to result.

4. Process of Making a Disclosure Request

The process begins when an individual sends a letter to a public body asking for disclosure of information pertaining to that individual or for a correction of information. If the request is for access to information, the head of the public body then has 30 days to respond (this time limit can be extended under s. 10). Section 8 requires that any response must either (a) inform the individual of where, when and how the record will be disclosed, or (b) detail the reasons the request was denied.

If the request is for a correction of information held by the public body, the head of the public body must either (a) correct the record, or (b) annotate the information with the correction that was requested. The head of the public body must next notify all other parties to whom the information in question has been disclosed within the past year.

Under s. 42, the Information and Privacy Commissioner oversees the administration of the Act. An individual can ask the Commissioner to review any decision pertaining to access or correction within 30 days of notification of the decision (although s. 53(2)(b) allows the Commissioner to extend this limitation period). Please refer to the [FIPPA](#) and its regulations for a detailed description of the review process.

The Commissioner has significant power to enforce judgment (much more so than the equivalent federal official). Generally speaking, the burden is on the public body to justify its refusal to disclose information (although there are notable exceptions pertaining to third party interests (see s. 57)). The head of a public body must comply with an order of the Commissioner unless an application for judicial review is brought within 30 days (s. 59). A person other than the head of a public body who is dissatisfied with a decision of the Commissioner may seek judicial review pursuant to the [Judicial Review Procedure Act](#).

For further information, contact:

The Information and Privacy Commissioner for British Columbia

PO Box 9038, Stn. Prov. Govt.
Victoria, B.C. V8W 1H2
Telephone: (604) 660-2421

Fax: (250) 387-1696
E-mail: info@oipc.bc.ca
Website: www.oipc.bc.org

J. The B.C. Privacy Act

The B.C. [Privacy Act](#), R.S.B.C. 1996, c. 373, creates a “tort, actionable without proof of damages, for a person, wilfully and without claim of right, violating the privacy of another”. Section 1(2) of the Act entitles a person to the nature and degree of privacy that is “reasonable in the circumstances”, but the Act itself gives limited guidance to the courts on what particular circumstances are deemed to be an unreasonable invasion of privacy. However, s. 2 does set out a number of defences.

Most of the reported cases brought under the Act have been unsuccessful, largely because the courts have been reluctant to accept a broad view of what type of expectations of privacy are reasonable. One difficulty with the Act is that a person offended by an invasion of privacy is unlikely to seek redress through a public process that will have the effect of a further airing of the private matter.

Actions under the [Privacy Act](#) must be brought in the Supreme Court.

III. COMPLAINTS CONCERNING POLICE CONDUCT

A. *Introduction*

LSLAP students will often be consulted by clients who are dissatisfied with the level of service given by the police. To assist students in advising such clients, the following section outlines some of the informal and statutory procedures governing citizen complaints against police officers.

There are two main categories of police forces in B.C.: municipal police forces, which are governed by the B.C. Police Act, R.S.B.C. 1996, c. 367, and the RCMP, which is governed by the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10 [RCMPA]. The RCMP is the policing agency in all parts of B.C. not served by a municipal police force. Their status as the provincial police force is authorized under s. 14 of the B.C. Police Act. Municipal police forces and the RCMP will be dealt with separately, as the complaint process for each is significantly different.

B. *Governing Legislation and Resources*

1. **Legislation**

Police Act, R.S.B.C. 1996, c. 367.

Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10.

2. **Resources**

British Columbia Civil Liberties Association

550 – 1188 West Georgia Street
Vancouver, B.C. V6E 4A2
Website: www.bccla.org

Telephone: (604) 687-2919
Fax: (604) 687-3045
E-mail: info@bccla.org

Office of the Police Complaints Commissioner:

Website: www.opcc.bc.ca

E-mail: info@opcc.bc.ca

Victoria

3rd Floor - 756 Fort Street
P.O. Box 9895 Stn Prov Govt
Victoria, B.C. V8W 9T8

Telephone: (250) 356-7458
Fax: (250) 356-650

Vancouver

320 - 1111 Melville Street
Vancouver, B.C. V6E 3V6

Telephone: (604) 660-2385
Fax: (604) 660-1223

- Toll-free outside of Vancouver: Call Enquiry B.C. at 1-800-663-7867 and ask to be connected to the Office of the Police Complaints Commissioner.

Commission for Public Complaints Against the RCMP

E-mail:
complaints@cpc-cpp.gc.ca (complaints)
org@cpc-cpp.gc.ca (general inquiries)
Website: www.cpc-cpp.gc.ca

Anywhere in Canada: 1-800-665-6878
Telephone (Ottawa): (613) 952-1471
Fax: (613) 952-8045
Telephone (Greater Vancouver): (604) 501-4080
Fax: (604) 501-4095

- To use the online complaint form click on the “Make a Complaint” link.

C. Complaints Against a Member of a Municipal Police Force

1. General Information

The Police Act sets out a framework for dealing with public complaints about municipal police forces in B.C. The Office of the Police Complaints Commissioner (OPCC) was created as a body independent from all municipal police forces and government ministries. Complaints continue to be investigated by police departments, but the Police Complaints Commissioner monitors how police departments investigate and conclude complaints throughout all the municipal police areas. The process is outlined below. For further information and a more detailed description of the complaint process, please refer to the OPCC website at www.opcc.bc.ca, or see Part 11 of the Police Act.

NOTE: Based on recommendations made in the February 2007 Report on the Review of the Police Complaint Process in B.C. by Josiah Wood, the Police Act was amended and the new Police Act came into force on March 31, 2010. The OPCC website now provides an on-line Complaint form to make the filing of complaints easier.

2. The Complaint Process

A complaint concerning any conduct of a member of a municipal police department that is alleged to constitute misconduct may be made to and registered with the police complaint commissioner. Misconduct is defined as a public trust offence which renders a member unfit to perform his or her duties or discredits the reputation of the municipal police department. For an exhaustive definition of misconduct see s. 77 of the Police Act. Complaints can be brought by a person who is directly affected by, or witness to the conduct, by an individual known to and acting on behalf of the person witness to the misconduct, or by a third-party complainant. Also, a complaint must be made within **12 months** of the date on which the misconduct took place. If good reasons exist, and it is not contrary to the public interest, the police complaint commissioner can extend that period.

a) Step 1: Making a Complaint

A complaint may be submitted as a “registered” complaint, or as a “Non-Registered” complaint. By submitting a “registered” complaint, the complainant is kept informed of the investigation and outcome. The complainant is also given the right to appeal the decision if they are not satisfied. A “Non-Registered” complaint is a means for a complainant to alert the department and the OPCC of their concerns without participating in the formal process. By choosing this route, a complainant waives their right to appeal and to be informed of the outcome. Complaints can be registered either directly with the OPCC or with a member on duty at a municipal police station, who is assigned to receive Police Act complaints. Members on duty in the station or on the road may also receive oral complaints from the public that do not result in a formal complaint being registered. These complaints are deemed to be “Non-Registered” complaints. Both types of complaints can be made through an online complaint form on the OPCC website.

b) Step 2: Admissibility

All complaints must first be reviewed by the Police Complaint Commissioner to determine whether it is admissible. In order for a complaint to be admissible, the complaint must: contain at least one allegation that, if proved, would meet the definition of misconduct (see s. 77, of the Police Act); be made within 12 months of the date of the incident; and not be frivolous or vexatious. Complainants will be contacted to tell them whether their complaint is admissible or not. There is no

appeal concerning the Commissioner's determination of admissibility. Once the Commissioner determines a complaint is admissible a Notice of Admissibility is sent to the Complainant and to the Chief Constable of the department involved. The Chief Constable must notify the member or former member of the complaint that has been made against him or her, appoint an investigator and, depending on the circumstances of the misconduct alleged, determine whether the matter is suitable for informal resolution.

NOTE: Complaints regarding a municipal police department's policies or services provided may be admissible and should be made under a different process. Complainants wishing to do so should contact the OPCC office directly.

c) Step 3: Informal Resolution or Mediation

A complaint may also be Informally Resolved any time before or during an investigation if the matter is suitable and the complainant and the member or former member agree in writing to the resolution. Informal resolution or mediation is a voluntary, confidential process that provides a non-confrontational opportunity for both parties to talk to each other and hear how their actions affected the other. If a complainant does not want to meet face to face, a neutral third party or professional mediator can facilitate and help the parties reach an agreement. Within 10 business days after agreeing to the proposed informal resolution the complainant or member or former member may revoke agreement by giving written notification of the revocation to the discipline authority concerned or the Police Complaint Commissioner.

If a complainant strongly objects to his or her complaint being informally resolved, and would prefer it be investigated immediately, he or she should let the OPCC know and provide reasons. Common reasons include: fear of intimidation by the officer, the wish to have it formally investigated and substantiated, a lack of time to participate in an informal process due to economic or other circumstances. Usually this objection is sufficient to move the complaint directly to the investigation step.

A complaint may also be resolved by mediation. If the Police Complaint Commissioner agrees, a professional mediator may be appointed to assist the complainant and the officer in resolving the complaint. The mediator is selected by the Administrator of the BC Mediator's Roster and is completely independent from any police department or the OPCC.

d) Step 4: Investigation

An investigation into a misconduct complaint is usually conducted by the originating department's Professional Standards Section. The Commissioner may, if the circumstances require, order the investigation to be conducted by an external police agency. The OPCC analyst who is assigned the file, will, at the same time, oversee the investigation being conducted by the Professional Standards investigator and ensure that the investigation is thorough, impartial and completed in a timely manner. All investigations must be completed within 6 months. During the investigation, the complainant and member will be provided with periodic reports advising on the progress of the investigation. At the conclusion of the investigation, the investigator will submit a Final Investigation Report to the Discipline Authority for a decision on whether the allegations are substantiated and, if so, any proposed corrective or disciplinary measures.

e) *Step 5: Pre-Hearing Conference*

If the discipline authority considers that the evidence referenced in the final investigation report or any supplementary report appears to substantiate an allegation of misconduct and require the taking of disciplinary or corrective measures, the discipline authority may offer the member or former member a confidential, prehearing conference to determine whether the member or former member is prepared to admit misconduct and, if so, what disciplinary or corrective measures the member or former member is prepared to accept. A pre-hearing conference is available only if it is not being contrary to the public interest. On approval by the police complaint commissioner, disciplinary or corrective measures accepted by a member or former member and approved by a prehearing conference authority at a prehearing conference constitute a resolution of the matter, which is final and not open to review by a court on any ground.

f) *Step 5: Discipline Proceeding*

If a prehearing conference is not offered or held or, if held, does not result in a resolution of each allegation of misconduct against the member or former member concerned, the discipline authority must convene a discipline proceeding within 40 business days after receiving the investigating officer's final investigation report. If at any time a public hearing is arranged by the police complaint commissioner in respect of conduct that is the subject of a discipline proceeding, the discipline authority must cancel the discipline proceeding.

The complainant must receive at least 15 days notice of a disciplinary proceeding. The complainant is allowed to provide written or oral submissions prior to the disciplinary proceeding being held, but is **not** entitled to attend the actual meeting.

In selecting disciplinary or corrective measures, a discipline authority must, if appropriate, choose measures to correct and educate officers, rather than measures intended to blame and punish.

Unless the Police Complaints Commissioner orders a public hearing, the resolution is final.

g) *Step 6: Public Hearing*

The Police Act empowers the Police Complaint Commissioner to order Public Hearings into matters involving misconduct by municipal police officers in British Columbia. At the conclusion of an investigation into a complaint, and under certain circumstances, the complainant and/or the member or former member may request a Public Hearing. The Police Complaint Commissioner may also arrange a Public Hearing without having received a request from either the complainant or the member or former member if the Police Complaint Commissioner considers that a Public Hearing is necessary in the public interest.

(1) Test for Ordering Public Hearing

In deciding whether such a hearing is necessary in the public interest, the Police Complaints Commissioner must consider all relevant factors including:

- the nature and seriousness of the complaint;

- the nature and seriousness of the harm alleged to have been suffered by any person as a result of the member or former member, including, but not limited to whether the conduct has undermined the public confidence in the police, the handling of complaints or the disciplinary process;
- whether a public hearing would assist in ascertaining the truth;
- whether a case can be made that there was a flaw in the investigation; the disciplinary or corrective measures proposed are inappropriate or inadequate; or the discipline authority's interpretation of the was incorrect.

After a public hearing takes place, the judge's decision is communicated to all interested parties. An appeal, on a question of law only, may be made to the B.C. Court of Appeal.

For help writing a letter of complaint against the Police Department, please pick up an informational brochure from:

B.C. Civil Liberties Association

550 – 1188 West Georgia Street

Vancouver, B.C. V6E 4A2

Brochure: www.bccla.org/othercontent/02policecomplaint.pdf

Telephone: (604) 687-2919

Fax: (604) 687-3045

D. Complaints Against a Member of the RCMP

1. General Information

Though the RCMP functions as provincial police in B.C., the complaint process is governed by the federal RCMPA. Under the Act, a Commission for Public Complaints Against the RCMP has been established to monitor complaints against members, to conduct its own investigations into allegations of misconduct, and to hold public inquiries into such allegations where it deems them appropriate. All members of the Commission are civilians.

During an informal resolution attempt, or a formal investigation, the complainant will likely make oral or written statements. It is unclear whether such statements could be used against the complainant in other proceedings. If a complainant is facing criminal charges or a civil action with regards to the same matter, the complainant should get the advice of counsel before making such statements.

The Commission can only make recommendations to the Commissioner of the RCMP regarding disciplinary action. However, if the Commissioner of the RCMP does not act on these recommendations, the Commissioner must give reasons for not doing so in writing to the Commission. Complaints against the RCMP in B.C. should be directed to:

Commission for Public Complaints Against the RCMP

B.C. and Yukon

102 – 7337 137th Street

Surrey, B.C. V3W 1A4

Telephone: (604) 501-4080

Toll-free: 1-800-665-6878

E-mail: complaints@cpp.gc.ca

Website: www.cpc-cpp.gc.ca

NOTE: The current process is subject to a boycott by a coalition of community groups who believe it is ineffective and that individuals should pursue civil claims in Small Claims Court instead. Refer to the Pivot Legal Society and B.C. Civil Liberties Association websites for more information: www.pivotlegal.org and www.bccla.org.

2. The Complaint Process

a) *Step 1: Making a Complaint*

A complaint may be made orally or in writing to the relevant RCMP detachment, to the Commanding Officer of “E” Division or to the Commission, either in Ottawa or at the regional office. The complaint will be acknowledged in writing. A member of the detachment will contact the complainant, and may attempt an informal resolution of the complaint. The most effective method is generally to send a written complaint to the Commission’s regional office.

b) *Step 2: Informal Resolution*

If no attempt is made to resolve the complaint informally, or if the attempt is unsuccessful, a formal investigation of the complaint will be carried out. The complainant must be informed in writing of the results of the investigation.

NOTE: Under s. 45.36 of the RCMPA the RCMP may refuse to investigate the complaint. If they refuse, the complainant may appeal this decision to the Commission for Public Complaints.

c) *Step 3: Formal Resolution*

A complainant who is not satisfied with the results of the investigation may request that the Commission review the handling of the complaint. This review could result in a refusal to conduct a further investigation, or the holding of a public inquiry into the complaint. There is no further appeal from the Commission’s decision.

E. *Civil or Criminal Proceedings*

Other approaches to dealing with misconduct by the police force are:

1. asking for a criminal investigation and acting as a witness; or
2. suing in tort to get compensation for loss.

1. Criminal Proceedings

The Criminal Code [CC] has been amended to circumscribe or limit the criminal liability of public officers in the course of conducting investigations or law enforcement activities, for acts or omissions that would otherwise constitute offences. Under ss. 25.1 - 25.4 of the CC, a public officer would be justified in committing an act or omission, or in directing another person to do so, that would otherwise constitute an offence, so long as the public officer:

- a) is investigating criminal activity or an offence under an Act of Parliament, or is enforcing an Act of Parliament;
- b) is designated as a public officer for the purposes of ss. 25.1 - 25.4 by the competent authority (the Solicitor General of Canada in the case of RCMP officers; the provincial Minister responsible for policing in the case of police forces constituted under provincial laws); and

- c) believes on reasonable grounds that the commission of the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances.

Whether the officer's act or omission is reasonable and proportional, and therefore justifiable, is determined with regard to the nature of the act or omission, the nature of the investigation, and the reasonable availability of other means for carrying out the public officer's law enforcement duties.

In addition, where a public officer's act or omission would otherwise constitute an offence and is likely to cause the loss or serious damage to property, the public officer would be justified in committing that act or omission if personally authorized to do so by a senior law enforcement official who believes on reasonable grounds that the act or omission is reasonable and proportional to the gravity of the offence or criminal activity being investigated.

However, these amendments do not justify the intentional or criminally negligent causing of death or bodily harm to another person by a public officer, nor does it justify an officer's conduct that would violate the sexual integrity of an individual.

Students should consult the 2009 Criminal Code (ss. 25.1 - 25.4) for further details on the limited criminal liability of public officers.

NOTE: Recommendations made by Thomas Braidwood on police accountability, suggest that the report calls for independent civilian investigative body to investigate more than just police-related deaths and injuries. The hope is to have the body implemented by the end of the year in B.C., following the lead of Ontario's Special Investigations Unit.

2. Civil Proceedings

Section 51 of the B.C. Police Act specifically states that the complaint proceedings outlined above do not preclude a citizen from taking, or continuing, civil or criminal proceedings against an RCMP officer or a municipal constable for misconduct. Typical actions that are launched against peace officers include tort actions in assault, battery, false imprisonment, or malicious prosecution and can now be brought in Small Claims Court. This could be helpful to clients who have been mistreated or suffered monetary loss because of police misconduct.

Though the usual manner of bringing a claim in Small Claims Court may be followed in suing the police, there are particular issues to keep in mind. In such a suit, the claimant would usually want to sue both the police officer and his employer. For a municipal police force this is the municipality; for the RCMP it is the Solicitor-General of British Columbia. If the complaint is against a municipal police force, **special limitation periods** apply. The municipality must be informed by letter of intent to sue within 60 days, and the notice of claim must be filed within 6 months. The regular Small Claims Court limitation periods apply if you are suing the RCMP or a private security guard.

Both municipal police and RCMP officers are provided partial immunity from civil liability by s. 21(2) of the Police Act. However, s. 21(3)(a) provides that this defence does not apply if the police officer has "been guilty of dishonesty, gross negligence or malicious or wilful misconduct". In *Ward v. British Columbia*, 2009 BCCA 23, it was held that, for the purposes of s. 21(3)(a), intentional torts qualify as wilful misconduct. In June 2009, leave to appeal to the Supreme Court of Canada was granted.

For detailed step-by-step information on suing the police (as well as private security guards), please see: Eby, David and Rix, Emily, How to Sue the Police and Private Security in Small Claims Court, (Vancouver: Pivot Legal Society, 2007).

IV. COMPLAINTS AGAINST SECURITY GUARDS

A. *Introduction*

Complaints against licensed security guards can be filed with the Ministry of Public Safety and Solicitor General. Complaints can relate to the licensing of a security business or security employee, about the conduct or behaviour of a security employee, or about the use of equipment. Filing a complaint is free. Complaining against an unlicensed guard should be done directly to the employer. Most security guards in BC are now required to be licensed under the Security Services Act, S.B.C. 2007 c. 30. General information and links can be obtained at www.securityandyou.ca. This website is a project of the B.C. Human Rights Coalition aimed at raising public awareness.

B. *Filing the Complaint*

Complaints must be made in writing within one year of the incident. Complaint forms can be obtained by contacting the Ministry or online.

**Ministry of Public Safety and Solicitor General
Security Programs and Police Technology Division**

PO Box 9217 Stn Prov Govt

Victoria, BC V8W 9J1

Website: www.pssg.gov.bc.ca/securityindustry

Telephone: (250) 387-3374

Fax: (250) 387-4454

Email: sgspdsec@gov.bc.ca

Once a complaint has been filed, the Ministry will determine whether the matter is within their jurisdiction. If it is, then an investigator will be assigned. The complainant is then notified by letter of the investigation. Complaints can result in a warning notice, a violation ticket, or reconsideration of the officer's licence status.

Similar to police, licensed and unlicensed security guards can be sued civilly.

NOTE: Recently, there a case before the B.C. Human Rights Tribunal regarding downtown ambassadors. Pivot Legal Society alleged that the Downtown Vancouver Business Improvement Association (DVBIA) is discriminating against individuals who appear to be homeless or addicted to drugs by limiting their access to public space (e.g., sidewalks) on the basis of race, colour, ancestry, and physical and mental disability, contrary to s. 8 of the Human Rights Code. The complaint relates, in particular, to a program funded by the City and the DVBIA known as the Downtown Ambassadors Program. The case has been concluded. A decision is expected within the next few months that should have significant implications for how security guards conduct themselves in public spaces.

V. THE RIGHT TO VOTE

A. *Introduction*

The right to participate in the selection of their elected representatives is a basic right enjoyed by the citizens of any democracy. While this has always been recognized to some extent in Canada, in 1982 the right to vote was entrenched in the constitution by s. 3 of the Canadian Charter of Rights and Freedoms. Under s. 3, “(e)very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein”.

While this right is qualified by s. 1 of the Charter, it is not subject to the overriding power provision (the “notwithstanding clause”) of s. 33. As a result, any government wishing to place restrictions on the right to vote must do so in a manner that is reasonable and demonstrably justified in a free and democratic society.

In this chapter, the discussion of voting rights will focus primarily on the requirements a person must meet to be eligible to vote in provincial, federal, and municipal elections.

B. *Governing Legislation and Resources*

1. Legislation

Canada Elections Act, R.S.C. 2000, c. 9.

Election Act, R.S.B.C. 1996, c. 106.

Local Government Act, R.S.B.C. 1996, c. 323.

Vancouver Charter, S.B.C. 1953, c. 55.

2. Resources

Elections British Columbia

Website: www.elections.bc.ca

Elections Canada

Website: www.elections.ca

C. *British Columbia Provincial Elections*

Eligibility requirements for B.C. provincial elections are outlined in the Election Act, R.S.B.C. 1996, c. 106. A student should consult this Act if a client has a specific problem as the Act is too lengthy to be discussed in detail in this chapter.

1. General Information

The province is divided into various electoral districts, each represented by an elected Member of the Legislative Assembly (MLA). Each district has a registrar of voters whose duty is to ensure that the election of candidates in that district is carried out properly. The elections process is supervised by the Chief Electoral Officer. Elections B.C. can be contacted at:

Elections British Columbia

P.O. Box 9275 Stn

Provincial Government

Victoria, B.C. V8W 9J6

Toll-free: 1-800-661-8683

Telephone: (250) 387-5305

Website: www.elections.bc.ca

2. Who is Eligible to Vote

Section 31 of the Act authorizes the registrar to include on the voters' list any person who meets all the following qualifications:

- a) is a Canadian citizen;
- b) is 18 years of age or older at the time of registration, or if an election is in progress for the electoral district for which the individual will be entitled to vote on registration, who will be 18 years of age or older on general voting day for the election;

- c) has resided in B.C. for the last six months;
- d) resides in the electoral district for which that person applies; and
- e) is not disqualified from voting under s. 29(f).

The wording used in s-s. (c) above seems to constitute a *prima facie* violation of s. 3 of the Charter, which guarantees every citizen the right to vote in a provincial election. The residency requirement in s-s. (c) effectively bars citizens who have recently moved to British Columbia from voting in the province in which they now reside.

It appears however that this requirement is indeed constitutional. In *Re Yukon Election Residency Requirements* (1986), 2 B.C.C.R. (2nd) 50 (C.A.), B.C.'s Court of Appeal sitting as the Yukon's Court of Appeal upheld a 12-month residency requirement imposed by the territorial government. The court found that this was a reasonable limit that was justified because of the desirability of having only persons familiar with local conditions voting for local representatives.

Section 30 purports to disqualify from voting any person:

- a) who is the chief electoral officer or the deputy chief electoral officer; or
- b) who is prohibited from voting under Part 12 (Offences).

Keep in mind that this is just a general guide, and is not meant to be an exhaustive list. Consult the Elections Act for more detailed and extensive information.

The purpose of s. 32 of the Elections Act is to ensure that otherwise eligible voters cast their ballots in the electoral district in which they live. The Act defines a residence as the place where a person's habitation is fixed, and to which, if he or she is absent, he or she intends to return. Further, there are a few other points to keep in mind:

- Leaving one's home temporarily does not affect a person's residency status, but if that person leaves with the intention to remain away either indefinitely or permanently, that person's resident status in B.C. is lost.
- Persons entering the province temporarily are not considered to be resident for election purposes.
- Generally, where a person's family resides is deemed to be his or her home, but if that person moves out of the home and does not intend to return there, the place moved to will be deemed his or her residence.
- A single person's residence is where that person sleeps, regardless of where he or she eats or is employed.
- A change of residence occurs only if a person moves to and intends to remain in another place.
- Canadian military personnel who reside in B.C. but who, in the course of their employment leave the province for extended periods of time, do not lose their resident status for that reason alone. Spouses and children who accompany such persons may also retain their B.C. residence status.

3. Registration and Voting Procedures

Eligible voters who are not presently on the voters' list in their district may obtain an application form from the registrar of the Electoral District in which they reside. Occasionally the Registrar General will authorize the hiring of Deputy Registrars to visit residences for the purposes of obtaining new applications.

Upon receiving an application and being satisfied that the application is valid and correct, the District Registrar will add the applicant's name to the voters' list. That person is then eligible to vote in the next provincial election.

An eligible voter may also register at a voting place on the day of the election. Amendments to the Election Act enacted in 2008 require that the applicant produce identification in the form of either:

- a) one document, issued by the Government of British Columbia or Canada, that contains the applicant's name and photograph, and place of residence,
- b) one document, issued by the Government of Canada, that certifies that the applicant is registered as an Indian under the Indian Act (Canada), or
- c) at least 2 documents of a type authorized by the chief electoral officer, both of which contain the applicant's name and at least one of which contains the applicant's place of residence.

Alternatively, s. 41.1 allows for a process by which an eligible voter without documentation may be "vouched" for by a voter registered in the applicant's electoral district with documentation, a family member, or "a person having authority under the common law or an enactment to make personal care decisions in respect of the applicant.

When an election writ is issued, the District Registrar will advertise in newspapers announcing the closing day for applications to register.

According to the court in *Hoogbruin v. B.C. (Attorney General)* (1985), 70 B.C.L.R. 1 (C.A.), individuals have a constitutional right to use absentee ballots. The procedure for absentee balloting is outlined in s. 105 of the Election Act. Section 27 requires that general voting day for an election is the 28th day after the date on which the election is called. If that day is a holiday, the election will be on the next day that is not a holiday. Section 76(1) makes advance polls available from noon to 9 p.m. on the Wednesday, Thursday, Friday, and Saturday of the week **preceding** election day. On election day itself, polls are open from 8:00 a.m. to 8:00 p.m.

If a voter does not understand English, s. 269(3) states that a sworn interpreter may be used to translate the required oath to the voter. Under s. 269(4), before acting as a translator under ss. (3), an individual must make a solemn declaration that the person will be able to make the translation and will do so to the best of his or her abilities.

Section 109 deals with special circumstances, whereby voters with physical disabilities or difficulties in reading or writing are able to get assistance in marking their ballots.

Employees are entitled by s. 74 to four **consecutive** hours off during poll hours to attend a polling station, without loss of wages. However, the employer is entitled to choose which four hours are most convenient. Upon arrival at the polling station, the voter must sign his or her name in a voting book (s. 274), and confirm present address. Refusing to comply with this demand will disqualify the voter. Upon receiving a ballot, the voter proceeds to a screened compartment, marks the ballot and returns the ballot to the Returning Officer, who in full view of the voter, must place the ballot in the ballot box. The voting must be by a

secret ballot as per s. 90. Each individual present at a voting place, including people such as voters and ballot counters, must not interfere with an individual marking a ballot, attempt to discover how an individual voted, or communicate information regarding how another person voted or marked their ballot. The voter is then required to leave the premises.

D. Federal Elections

The rules and regulations governing federal elections are in the Canada Elections Act, R.S.C. 2000, c. 9 and its subsequent amendments. Many of these rules and regulations are similar to those applicable to B.C. provincial elections discussed above. A brief survey of the federal Act is included below.

Canadian citizens who are 18 years of age or older on election day are generally eligible to vote in federal elections (s. 3). Under the statute, persons can be disqualified from voting for a variety of reasons (e.g., incarceration, or disqualified for corrupt or illegal practices).

However, the Federal Court of Appeal ruled in *Belzowski v. Canada*, [1991] F.C.J. No. 167, that the prohibition against voting by inmates is unconstitutional. This decision was followed by the Ontario Court of Appeal in *Sauve v. Canada (A-G)* (1992), 89 D.L.R. (4th) 644 and affirmed at the Supreme Court in *Sauve v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66. A key consideration in these decisions was the manifest lack of any “balancing” of the right to vote against the seriousness of the conduct of prisoners by the federal act’s denial of the vote to all prisoners. The Federal Court of Canada has held that people with mental disabilities do have the right to vote: see *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622.

While federal residency requirements do exist, they are more relaxed than those applicable to B.C. provincial elections. A person may vote only once, in the area in which she is “ordinarily resident”. This is defined in much the same way as “resident” is defined in s. 32 of B.C.’s Election Act. A person who moves between the enumerator’s visit and the day of the election could be forced to vote in the former riding if ordinarily resident there when the enumeration occurred.

There have been recent, and controversial, amendments to the Canada Elections Act with respect to voter identification requirements at the polls. These amendments require that all voters present one piece of government-issued ID with a photograph and residential address before being allowed to vote. If a voter cannot provide the required photo ID, he/she may still be allowed to vote if he/she does one of two things (s. 143):

1. provides two pieces of acceptable identification to establish his/her identity and residence (a list of “acceptable identification” is to be published by the Chief Electoral Officer); or
2. swears an oath as to his or her identity and is accompanied by an individual who is registered to vote in the same polling division, has proper identification, and vouches on oath and the prescribed form for the person without ID. An individual can only vouch for one person at an election, and an individual who has been vouched for cannot vouch for someone else.

These amendments pose significant challenges to low-income individuals who may have no form of official identification. Further difficulties are created by the rule that an individual may only vouch for one other individual and the requirement that the voucher live and be on the elector’s list in the same polling station as the intended vouchee. The constitutionality of these amendments was challenged in the British Columbia Supreme Court in *Henry v. Canada (Attorney General)* [2010] 610 BCSC. In that case, the court found that the legislation was inconsistent with the electoral rights guaranteed in s. 3 of the Charter, but constituted a reasonable limit, prescribed by law and demonstrably justifiable in a free and democratic society, under s. 1 of the Charter.

Many other provisions of the Canada Elections Act, such as an employee being entitled to receive time off work to cast a ballot, provisions for people with disabilities, and balloting procedures are very similar to B.C. provincial regulations and thus are not repeated here. Further inquiries can be sent to Marc Maynard, the current Chief Electoral Officer, at:

Elections Canada
Chief Electoral Officer
257 Slater Street
Ottawa, Ontario K1A 0M6

Telephone: 1-800-463-6868
Website: www.elections.ca

E. Municipal Elections

Municipal election procedures are outlined in the Local Government Act, R.S.B.C. 1996, c. 323, beginning at s. 33. Please note, however, that elections in the City of Vancouver are governed by a separate provincial act, the Vancouver Charter, S.B.C. 1953, c. 55.

To be eligible to vote, a person must normally be a Canadian citizen and 18 years of age or older on the day the election is held. A person thus qualified must be a Canadian citizen, and a resident of B.C. for six months immediately before election day. Furthermore, to be qualified, the person must have been a resident of the jurisdiction (as per s. 50) for at least 30 days immediately before election day.

A person who qualifies as outlined above with the exception that he or she does not reside in the municipality may still vote in an election if he or she is the owner or tenant of property in that municipality (s. 51). The general residency rules are similar to those outlined in the B.C. Election Act.

Applications to register should be made to the clerk of the municipality.

Voters who are not yet registered on election day may apply to have their name added to the list on election day in a manner similar to that used in provincial elections (see s. 57-57.1).

Similar to the identification requirements for Federal elections, a person who is unable to produce identification can be registered as a voter. In order to do so, the individual must complete an application for registration and be accompanied by someone who is a registered voter in the applicant's electoral district, an adult family member, or someone who has the authority to make personal care decisions in respect of the applicant. The applicant and the voucher must both make a solemn declaration, in writing, as to the applicant's identity and place of residence. A person can only vouch for one person, and an individual who has been vouched for cannot vouch for another person.

NOTE: A literal interpretation of both the Canada Elections Act R.S.C. 2000, c. 9, and the B.C. Election Act, R.S.B.C. 1996, c. 106, suggests that it is practically impossible for a homeless person to vote. However, the provincial electoral officer facilitates voting by homeless people through an administrative policy of allowing a flexible definition of "residence".

VI. Complaints and Appeals regarding the University of British Columbia

The Alma Mater Society (AMS) Ombuds Office and the AMS Advocacy Office work hand-in-hand to assist students who are in conflict with the University of British Columbia.

A. The AMS Ombuds Office

The AMS Ombudsperson can assist both graduate and undergraduate students who feel that they have been treated unfairly or need to approach the University or the AMS to resolve a conflict. The Ombudsperson acts impartially, is independent of any administrative body, and provides confidential service. The office is an excellent resource to resolve disputes with the University and university authorities such as Campus Security, Campus RCMP, Dean's Office, and Booking Services. The office provides the following services:

- conflict management services to AMS clubs and constituencies undergoing internal conflicts;
- facilitating and negotiating resolutions between students and the University;

- receiving and investigating complaints about the AMS;
- preparing student for meeting with university representatives;
- helping students with appeals;
- providing conflict resolution workshops;
- advising students about their options and resources;
- academic disputes: disputing grades, dispute between graduate students and supervisors, withdrawals, quality of instruction, etc.; and
- non-academic disputes: housing appeals, financial aid and registration issues.

Appeals may be filed at the office or online. The Ombuds Office is staffed 30 hours per week and may be contacted at:

The AMS Ombuds Office

SUB 249F - 6138 SUB Boulevard
 Vancouver, B.C. V6T 1Z1
 Website: www.ams.ubc.ca/ombuds

Telephone: (604) 822-4846
 Fax: (604) 822-9019
 Email: assist@ams.ubc.ca

B. *The AMS Advocacy Office*

In situations where a student needs to appeal a final decision made by a department, faculty or University representative, the AMS Advocacy Office can provide assistance by giving the student advice on their rights and responsibilities, assisting them with drafting letters and documents and representing students who must go before formal hearings at the University. Some of the specific issues the Advocacy Office helps with are:

- student discipline cases (plagiarism, cheating and non-academic discipline);
- academic appeals;
- residence or other UBC housing issues;
- parking disputes;
- requests for information under the Freedom of Information and Protection of Privacy Act; and
- library fine appeals.

The AMS Advocacy Office can be contacted at:

The AMS Advocacy Office

SUB 249G - 6138 SUB Boulevard
 Vancouver, B.C. V6T 1Z1

Telephone: (604) 822-9855
 Website: www.ams.ubc.ca/advocacy

VII. Complaints and Appeals regarding SIMON FRASER University

A. The SFU Office of the Ombudsperson

Similar to the AMS Ombudsperson, and performing most of the same functions, the SFU Office of the Ombudsperson can assist students in resolving conflicts with Simon Fraser University. Contact the current Ombudsperson at:

The SFU Office of the Ombudsperson

Jay Solman, Ombudsperson
2264 Maggie Benston Centre
Burnaby, BC V5A 1S6

Telephone: (778) 782-4563
Website: www.sfu.ca/ombudsperson
E-mail: jsolman@sfu.ca