

***STATUTORY IMMUNITY:  
A DISCUSSION PAPER***

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# 1 Introduction

As part of government's administrative justice reform initiative, the *Administrative Tribunals Act* (ATA) was enacted in 2004 to provide BC tribunals with modern, consistent powers and authorities. Government is now giving consideration whether to extend those powers and authorities to other entities.

The first stage of that consideration is whether to extend the ATA provisions for immunity protection, the power to summon witnesses and other evidence, and the opportunity to apply to the court for contempt to the various entities that still rely on the *Inquiry Act* as the basis for their authority in those areas. There are approximately 45 such entities, and they include various ministers and statutory decision makers, certain self governing professional bodies, some limited local government circumstances and certain of the Officers of the Legislature. (A list of these entities and their respective statutes is set out in Appendix A.)

This paper addresses statutory immunity; the power to summon witnesses and evidence and the contempt provisions are discussed in separate papers. These papers are intended to prompt discussion about whether to replace these powers with the ATA provisions or perhaps different provisions, or whether the power should be provided at all to a particular entity, with different entities likely to have different needs.

To prompt discussion about statutory immunity, this paper provides an introduction to the concept of legal immunity; a short overview of how statutory immunity grew out of and reflects aspects of Crown immunity and judicial immunity; some of the various types of statutory immunity provisions, including the *Inquiry Act* and the ATA immunity provisions; some discussion of indemnity as an alternative to immunity; and concludes with some of the policy considerations for and against providing statutory immunity. The next step will be to develop criteria to apply to the various affected entities, to determine the extent and type of immunity a particular entity may need to replace their *Inquiry Act* powers.

Your thoughts and ideas about the need for statutory immunity and whether and how it should be available to the affected entities are important to assist the AJO in developing criteria to apply, and you are invited to share those thoughts and ideas with the Ministry of Attorney General's Administrative Justice Office at:

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Or you can use the Feedback option on the AJO Web site at: [www.gov.bc.ca/ajo](http://www.gov.bc.ca/ajo)

Submission of comments by April 28, 2006 would be appreciated.

## 2 The Concept of Legal Immunity

“Immunity” is the protection from or resistance to an obligation, influence, or infection. In the legal context, immunity protects a person from legal obligations that would otherwise be imposed.

Legal immunity is not simply a defence to a legal action; immunity eliminates a person’s ability to advance a legal claim for wrongful action. If a legal claim is filed against them, a person with legal immunity only needs to ask the court to dismiss the claim on the basis of the immunity, without filing a defence to the claim.

## 3 Statutory Immunity

Statutory immunity is the protection from legal actions given to certain persons or entities by statute. For the most part, statutory immunity has grown out of and reflects Crown immunity and/or judicial immunity, both of which developed as common law principles.<sup>1</sup>

### ***Crown Immunity:***

Crown immunity, like many common law principles, has adapted and changed over time. It is based on the principle, which originated in the Middle Ages, that the “Crown” (the reigning King or Queen) could “do no wrong”.<sup>2</sup>

By the nineteenth century a special process had developed that could be used to bring legal actions against the Crown in relation to contract disputes and property rights,<sup>3</sup> however, that process could not be used to bring other kinds of claims of wrongdoing against the Crown, and the Crown remained immune with respect to these other claims.

As “the Crown” evolved into democratic government, the government took on more functions and delivered services and programs to its citizens through its employees and agents. While the government, as the Crown, retained immunity from legal actions for wrongful acts (excluding contract or property disputes), the courts concluded that the Crown’s immunity did not protect the government’s employees. This meant that government employees could be and were held personally liable for activities they undertook on behalf of the government. (This was quite different from the law that was developing for most other employers

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<sup>1</sup> Statute law is enacted by government and takes the form of legislation; common law is made by judges, building on earlier cases (precedents) which can involve interpreting and applying statutes.

<sup>2</sup> See Peter Hogg and Patrick Monahan, *Liability of the Crown* (Toronto: Carswell, 2000) at 4 (note 16) and 108.

<sup>3</sup> This special process was known as a “petition of right”.

and their employees – most other employers were being held legally responsible (“*vicariously liable*”) for their employees’ actions during the course of their duties.) The practice developed, however, where the government would typically provide legal counsel to defend claims against employees for job related activities, and pay the damages if the action was successful.<sup>4</sup>

By 1974 the provincial government recognized that the special immunity of the Crown was unfair and enacted the *Crown Proceedings Act*.<sup>5</sup> That Act expressly provides that the provincial government is liable in the same manner as if it were a person. However, it expressly does not authorize proceedings against the government for acts of a judicial nature, and Crown immunity still exists for these types of activities.<sup>6</sup>

### ***Judicial Immunity***

Judicial immunity protects judges from legal actions related to the performance of their judicial functions. Judicial immunity developed under the common law to protect judges’ independence in their decision making, which is fundamental to public confidence in the judicial system. If a party is dissatisfied with a judge’s decision, the appropriate course of action is to appeal the decision, not to sue the judge.<sup>7</sup>

This immunity also protects judges from legal actions or other proceedings for comments they make in the course of a judicial hearing.<sup>8</sup> Judicial immunity also

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<sup>4</sup> Provided the activity was in the course of employment and in the scope of job duties.

<sup>5</sup> On introduction to the Legislature, the *Crown Proceedings Act* was described as a major reform, intended to give citizens the same rights against government as government had against them. Crown immunity was described as an “age-long inequity” and “a relic of the mediaeval age when the King could do no wrong. ... where the subject had to go on bended knee to seek from Ministers of the Crown the right to sue the Crown... [It] is a relic of the time of the divine right of kings and should have no part in our modern jurisprudence.” See British Columbia, Legislative Assembly, *Debates of the Legislative Assembly (Hansard)*, 30 (18 March 1974) at 1300 (Hon. Mr. Macdonald).

<sup>6</sup> See *Crown Proceeding Act*, s. 3(2)(a)

<sup>7</sup> An extremely narrow exception to this rule applies when judges knowingly act beyond their jurisdiction. In *Taylor v. Canada (Attorney General)* [2000] 3 F.C. 298 (F.C.A.) at para. 63, the scope of this exception was compared to the malicious prosecution exception to prosecutorial immunity, which permits claims for damages against Crown prosecutors for “the deliberate and malicious use of the office” for ends that are “improper and inconsistent with the traditional prosecutorial function” (see *Nelles v. Ontario*, [1989] 2 S.C.R. 170). This suggests that judges could only be liable in damages when it is shown that they acted not only without authority, but also with the intent to injure a person.

<sup>8</sup> This aspect of judicial immunity protects not just judges, but also other persons involved in the proceeding (legal counsel, parties and witnesses) from being sued for statements made during the proceedings.

prevents a judge being compelled to appear as a witness about activities in relation to their judicial functions.<sup>9</sup>

However, while judges are immune from legal actions, complaints about judges can be made to the Judicial Council.<sup>10</sup> And, like private citizens, judges can be sued for their activities that are not in the exercise of their judicial office. Because judicial immunity applies to protect the judge personally, the personal liability issues that arose in relation to Crown immunity have not been an issue.

### ***Statutory Immunity***

As noted above, statutory immunity is the protection from legal actions expressly given by the Legislature to certain persons or entities. It is typically provided in recognition that the activities the person may be called on to undertake are in the public interest but could result in the person being exposed to personal liability. Statutory immunity grew out of, and in response to, the personal liability issues that arose because of Crown immunity from actions.

The language of the statutory immunity provisions varies, but a typical immunity provision includes four common elements to protect the person or entity:

- against liability for damages
- for anything done or omitted to be done
- in good faith
- in the execution of their duties or powers.

Some examples of these various specific statutory immunity provisions are set out in Appendix B.

Like many other statutory provisions, disputes can arise about whether a statutory immunity provision applies to protect someone in a particular situation, and the courts may be asked to “interpret” the provision (determine if it applies to that situation). In general, in disputes about an immunity provision that protects employees or individuals from personal liability, the courts tend to interpret these more broadly in order to protect the employee from personal liability, but in disputes about an immunity provision that protects the government or other corporate-type entities from liability, the courts tend to interpret these more narrowly, limiting their protection from liability, and requiring them to defend the action.<sup>11</sup>

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<sup>9</sup> While not compellable to give evidence, judges are “competent” to do so – that is, they are able to give evidence if they choose to do so. The English House of Lords has strongly suggested that where judges have evidence vital to a case, it is an ethical imperative for judges to cooperate and produce records or testify – see *Warren v Warren* [1996] E.W.J. No. 1025 at para. 33.

<sup>10</sup> Complaints about Provincial Court judges can be made to the provincial Judicial Council; complaints about judges of the BC Supreme Court, Court of Appeal or Supreme Court of Canada can be made to the Canadian Judicial Council. Information about the Canadian Judicial Council complaint process is available at the Canadian Judicial Council Web site: <http://www.cjc-ccm.gc.ca/article.asp?id=2806>.

<sup>11</sup> See *Liability of the Crown* at 120 (notes 58 and 59).

*Liability for “damages”*: Damages are the money the court orders to be paid to a person who has suffered loss or injury as a result of the unlawful act or omission of another person. Statutory immunity is generally considered to protect against all damages that could be ordered. A possible exception has been identified by the Ontario Court of Appeal, which found statutory immunity did not protect a government regulator from claims by a person that the regulator be ordered to contribute to damages that that person had been ordered to pay to the injured party.<sup>12</sup> However, this may be an example of where the court has read an immunity provision very narrowly in order to impose liability on the government; had the immunity provision applied to an individual employee for job related activity, the result may have been different.

*“Anything done or omitted”*: This makes it clear that not only is the person protected from legal claims for their actions, they are also protected from claims based on any failure to act for which they might otherwise be liable. (An immunity provision is not required to protect a person from liability for their actions or failure to act, if that action or failure to act does not provide a basis for another valid legal claim. Under general legal principles, any claim can be dismissed at an early stage, even without an immunity provision, if it does not disclose a cause of action recognized at law. However, because the courts tend to be reluctant to strike claims at an early stage, except on the very clearest of cases, an immunity provision can be beneficial as providing the basis to dismiss the claim and avoid having to unnecessarily defend an action that has no legal basis.)

*“In good faith”*: Until recently, establishing the good faith element necessary to claim the protection of an immunity provision could be satisfied quite simply. For the protection to apply, the person needed only to have acted honestly and to have had no reason to be aware of a mistake they were making.<sup>13</sup> A person could be found to be acting in good faith even without specific statutory authority for their actions, provided they acted on a *genuine belief* of statutory authority.<sup>14</sup> However, in another example of a narrow interpretation to limit an entity’s immunity, the Supreme Court of Canada recently found that a lack of good faith may be presumed against an entity if the actions were found to be seriously careless or reckless.<sup>15</sup> This may now mean governments or other entities and,

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<sup>12</sup> *Ukrainian (Fort William) Credit Union v. Nesbitt Burns Ltd.* (1997), 152 D.L.R. (4th) 640 (C.A.). In other words, where a person is 100% liable, they are protected by a clause immunizing against claims for damages, but where the person is 25% responsible, the same immunity clause would not protect that person against claims for contribution to payment of damages by the other liable party. This principle might also extend to employees. Note however that legal commentators Peter Hogg and Patrick Monahan suggest that the reasoning of the case is faulty, and the decision should not only not be applied in other provinces, it should be overruled in subsequent Ontario cases – see *Liability of the Crown* at 192.

<sup>13</sup> *Stenner v British Columbia (Securities Commission)* (1996) 141 D.L.R. (4<sup>th</sup>) 122 (B.C.C.A.).

<sup>14</sup> *M. (M.I.) v. H. (T.)* (1991) 82 DLR (4<sup>th</sup>) 609 (B.C.C.A.) at 620 and 621.

<sup>15</sup> *Finney v. Barreau du Québec*, 2004 SCC 36

quite possibly, individuals will have to meet a higher standard to satisfy the good faith aspect of their immunity protection.

*In the “execution of their duties and powers”*: The difference between a “duty” and a “power” is that “a person who is under a duty to act has no discretion and must act whenever that duty arises while a person with a power to act can do so as he or she feels appropriate in his or discretion”.<sup>16</sup> Whether the action, or failure to act, was within the person’s duties or powers will depend on a careful review of the person’s or entity’s authority.

Whether the government or another entity is liable for the actions of their immune employee will depend on the specific legislation under which the immunity is granted. In the case of actions of a judicial nature by government employees, the *Crown Proceedings Act* exemption will apply and the government will not be liable. Other entities are not subject to the *Crown Proceedings Act* and the entity’s liability for its employees’ or members’ activities will depend on the provisions of the statute under which the immunity is provided.

#### **4 Immunity under the *Inquiry Act***

Section 12 of the *Inquiry Act*<sup>17</sup> provides commissioners of inquiry with the “same protection and privileges, in the case of an action brought for an act done or omitted to be done in the exercise of their duties, as are by law given to judges of the Supreme Court”.<sup>18</sup> The reasons for this immunity are similar to the reasons for judicial immunity (discussed above): it enables inquiry commissioners to make decisions and report on matters within their mandates, without fear of legal action against them as a result of their findings, and protects public confidence in the independence of the inquiry process.

*Inquiry Act* immunity is broader than the standard statutory immunity against liability for damages. Like judicial immunity, it also protects inquiry

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<sup>16</sup> Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 1988-) at 5-7.

<sup>17</sup> Set out in Appendix B.

<sup>18</sup> The constitutionality of provincial legislation extending judicial immunity to persons who are not judges was accepted by the Nova Scotia Court of Appeal in *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)*, 1999 CanLII 2477, 179 N.S.R. (2d) 213. The issue was whether granting judicial immunity to persons others than judges violated the *Constitution Act, 1867*, sections 91 and 92 (division of powers between federal and provincial governments) and section 96 (powers granted to judges). The Court concluded that a provincial legislature could grant immunity similar to that of judges to members of an administrative body as a matter of “property and civil rights” within provincial jurisdiction under section 92(13). The Court also concluded that the provision did not infringe section 96 as it did not grant powers that are “broadly conformable or analogous” to the jurisdiction or powers exercised by judges appointed under that section.



commissioners from being compelled to give evidence in relation to their activities.<sup>19</sup>

Like judicial immunity, this immunity only applies to a commissioner's activities in exercising his or her duties. However, unlike the ATA's section 56 (discussed below), section 12 only provides express immunity protection for acts done or omitted to be done in the exercise of "duties", it does not refer to acts done or omitted to be done in the exercise or intended exercise of a "power".

The duties imposed on commissioners who operate under authority of the *Inquiry Act* are to carry out and complete the inquiry, hold meetings they think necessary, and report their findings on the matters to be examined.<sup>20</sup> A commissioner's duties end on the delivery of his or her report. The BC Supreme Court has found that a commissioner who, after issuing his report, voluntarily appeared as a witness in court proceedings with respect to the report, was not acting within his duties as a commissioner.<sup>21</sup>

If while fulfilling their duties within the scope of the inquiry, a commissioner fails to comply with the principles of natural justice, he or she will not be liable.<sup>22</sup> In that situation, the appropriate recourse is to apply to the court for judicial review.<sup>23</sup>

With respect to government's liability for the acts of a commissioner of inquiry, because section 12 of the *Inquiry Act* expressly provides for the immunity of a judge, those acts might be presumed to be of a judicial nature. The *Crown Proceedings Act* exemption from liability for acts of a judicial nature would apply, and government would not be liable for them.

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<sup>19</sup> While an appeal or a complaint to the Judicial Council is not available with respect to commissioners' reports, judicial review may be available under the *Judicial Review Procedure Act*.

<sup>20</sup> *Inquiry Act*, s. 14(1).

<sup>21</sup> *Rigaux v. Ministry of Social Services (Commissioner of Inquiry)* 1998 CanLII 6320 (B.C.S.C.). The court found that despite not being compellable as a witness, the commissioner went to extraordinary lengths to be heard on a judicial review of her report. Because this was not within the execution of her duties, she was held to be liable for the legal costs of her participation. (She was, however, indemnified under the *Inquiry Act*.)

<sup>22</sup> In *Morier v. Rivard* [1985] 2 S.C.R. 716 at para. 110, the Supreme Court of Canada considered the distinction between duties and jurisdiction under s. 16 of the *Act respecting public inquiry commissions*. The Court concluded that in that case it would contravene the Quebec *Charter of human rights and freedoms* and be a jurisdictional error to not inform a person of the facts alleged against them, or give the person an opportunity to be heard, but the commissioner would not be liable because the error was jurisdictional.

<sup>23</sup> *Morier* (see note 21 above) at para. 110.

### ***Inquiry Act Immunity as it applies to various other individuals and entities***

Almost 50 statutes provide various individuals and entities with immunity by adopting section 12 of the *Inquiry Act*. Those statutes and the individuals and entities protected are listed in Appendix A.

The protected individuals and entities include certain administrative justice tribunals, self-governing professions in relation to their disciplinary committees, statutory decision makers, ministers and their delegates, local government bodies and Officers of the Legislature.

*Administrative justice tribunals* - The extension of judicial immunity to administrative tribunals reflects the growth of these entities as an alternative to the courts to resolve disputes. (As mentioned above, for most tribunals, section 12 *Inquiry Act* immunity has been replaced by section 56 of the *Administrative Tribunals Act*, discussed below and also set out in Appendix B.)

*Self-governing professions* - Similarly, judicial-like immunity has been extended to the disciplinary committees of the self-governing professions that enforce the expected standards of conduct and competence, as those committees may be called on to make findings and issue orders, similar to a judge in a hearing. As such, these committee members may also be protected from legal actions in relation to their activities and orders in these hearings.

*Statutory decision makers and ministerial delegates* - Section 12 immunity has also been extended to various provincial government officials who are called on to make impartial decisions in the course of their duties, such the chief gold commissioner for the purpose of investigating disputes. Judicial immunity has also been extended to some of those persons who are by statute authorized to conduct investigations, such as the provincial health officer.

*Officers of the Legislature* - Officers of the Legislature provide oversight of government activities and may be similar to judges and inquiry commissioners in the need for decision-making independence to protect public confidence in their oversight role.<sup>24</sup> Some of these officers are protected by the *Inquiry Act* immunity, while others have immunity provisions under their own legislation.<sup>25</sup>

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<sup>24</sup> BC's seven Officers of the Legislature are the Conflict of Interest Commissioner, the Information and Privacy Officer, the Chief Electoral Officer, the Ombudsman, the Police Complaint Commissioner, the Merit Commissioner and the Auditor-General. Other similar bodies with *Inquiry Act* immunity are the Electoral Boundaries Commission and the Speaker of the Legislative Assembly.

<sup>25</sup> Section 18 of the *Auditor General Act*, for example, provides that:

(1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against the Auditor General or a person appointed or engaged under section 8 because of anything done or omitted in

(a) the exercise or intended exercise of any power of the Auditor General, or

(b) the performance or intended performance of any duty of the Auditor General.

*Local government bodies* - Section 12 of the *Inquiry Act* has also been adopted by the *Local Government Act* to give the Inspector of Municipalities statutory immunity relating to an inquiry under that Act, and by the *Vancouver Charter* to give a barrister engaged by the City immunity in the conduct an investigation into city matters.

*Vicarious Liability* - With respect to government's liability for the acts of its employees or agents to which section 12 of the *Inquiry Act* applies, as noted above, those acts might be presumed to be of a judicial nature so that the *Crown Proceedings Act* exemption would apply and government would not be liable. However, as that immunity does not apply to non-government entities, their liability for the activities of their employees or members may depend on other provisions of their individual statutes.

## **5 Immunity under the *Administrative Tribunals Act***

The *Administrative Tribunals Act* ("ATA") provides comprehensive powers and authorities for various quasi-judicial decision makers in BC, including standard provisions for statutory immunity (section 56) and for protection against compulsion (section 55).<sup>26</sup>

Section 56 provides statutory immunity for "decision makers", which is expressly defined to include a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process on behalf of the tribunal.

This immunity protection provides that no legal proceeding for damages may be brought against a decision maker, the tribunal or the government because of anything done or omitted in the performance of duty or exercise of power. The element of good faith is incorporated by providing that a proceeding for damages may be brought for anything done or omitted to be done in bad faith.<sup>27</sup>

This provision has not yet been considered by the courts, however, the cases that have considered the various other statutory immunity provisions and section 12 of the *Inquiry Act* would likely inform the court when asked to interpret section 56 of the ATA.

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(2) Subsection (1) does not apply to a person in relation to anything done or omitted in bad faith.

<sup>26</sup> The ATA provisions are applicable to an entity only if adopted by reference under the entity's enabling legislation.

<sup>27</sup> Note however that there may be a difference between "not acting in good faith" and "acting in bad faith". It is unclear whether acting with serious carelessness or recklessness, which the Supreme Court of Canada has identified as constituting a failure to act in good faith (discussed above in section 3), is enough to constitute acting in "bad faith".

Note that section 56 does not specifically refer to judicial immunity, but Section 55 protects tribunal members, like judges, from being compelled to appear as a witness in any proceeding, with the limited exception for criminal proceedings. Section 55 extends compulsion protection to persons acting on behalf of or under the direction of a tribunal member and also to persons who conduct dispute resolution processes on behalf of or under the direction of the tribunal.

With respect to vicarious liability, the *Crown Proceedings Act* does not need to be looked to, as section 56 expressly extends immunity to the government because of anything done or omitted in the performance or intended performance of any duty under the ATA or the tribunal's enabling Act, or in the exercise or intended exercise of any power under the ATA or the tribunal's enabling Act.

## 6 Alternatives to Immunity

Indemnity and insurance may provide effective alternatives to immunity, without limiting a person's right to bring a legal claim.

*Indemnity* - An indemnity is where one person agrees to be responsible for payment of losses that may be incurred by another person, which may include the cost of defending a legal action and any damages that might be awarded if the claim is successful. The indemnity can specify the types of losses that will be covered and can have other terms and conditions, such as the types of activities covered or the time frame during which the indemnity is effective.

An indemnity does not stop a person from proceeding with their legal claim. An indemnity has no effect on the claim, and will not impact whether the claim is successful. The person who brings the claim has no legal interest in the indemnity; the indemnity is a matter between the person being sued and the person who gave the indemnity.

Typically an indemnity respecting damages in a legal action will also give the person who provided the indemnity the right to select the legal counsel who will defend the action on behalf of the person who is being sued.

An indemnity can be provided voluntarily, or can be by agreement between the two parties, or in some cases, it can be imposed by statute or as a result of the collective bargaining process or other relationship between the parties. For example, the government may indemnify its employees for a variety of proceedings, in some cases as a result of the collective bargaining process and in others by virtue of the Public Service Agency Terms and Conditions of Employment for Excluded Employees.<sup>28</sup>

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<sup>28</sup> Section 73 "Indemnity Protection" provides that::

"Where an employee/appointee is sued for anything done or omitted to be done in the course of his or her office or employment, and the Ministry of Attorney General provides the

An indemnity is, in a sense, like insurance but no premium is paid by the person who is indemnified. An indemnity can be costly to the person who provides it, if called on to pay under the indemnity.

*Insurance* – Insurance may be obtained to provide coverage for claims for damages for wrongful actions, and is a cost of doing business for many professionals and other entities. Directors' insurance, for example, is becoming a standard expectation. However, insurance premiums can be expensive, especially for an individual to obtain on their own behalf, even though the risk of successful action may be low. In addition, care must be taken to ensure that the insurance coverage obtained will be sufficient.

Indemnity or insurance may be effective alternatives to immunity that do not reduce or eliminate a citizen's right to bring a claim. However, the costs of these options, and the court resources that may be required to support their recognition, are factors that may need to be considered.

## **7 Policy Discussion**

Having canvassed the various types of immunity and some alternatives, the questions that need to be asked are:

- whether a particular position or entity needs to be immunized or should be given immunity,
- is there is another, better alternative to immunity
- if immunity is required, what type of immunity should be provided
- whether there should be any limits on the immunity
- whether any other entity should be vicariously liable

To answer those questions requires consideration of the possible implications to the various parties who may have an interest: the persons who may benefit from immunity protection, the persons whose rights may be limited or restricted by the immunity, and the general public who also have an interest in these matters. To assist in that consideration, some of the reasons that might be considered are set out below.

Some factors to provide immunity to a person for personal liability for their actions, if carried out in good faith, may include:

- ❖ The nature of the person's work may be such that there will often be one party who is dissatisfied with the outcome. For example, in most decision-making,

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Government with a legal opinion that the employee/appointee's conduct was within his or her office or course of employment and was in good faith, the Ministry of Attorney General shall defend the lawsuit and the Government shall indemnify the employee/appointee against the expenses of the defense and any settlement reached or judgment awarded; but this subsection does not apply where an employee/appointee is sued for defamation.

there is typically a “winner” and a “loser”, so one party is likely to be dissatisfied with the result and may want to take further steps to obtain a more favourable outcome.

- ❖ Appeal rights or other opportunities for review by the court or an independent party are more appropriate than law suits against the decision maker. Decision makers should be free to make their decisions based on the law, without having to be worried about having to respond to legal actions as a result of their decisions.
- ❖ The public interest requires that decisions or determinations be made by qualified persons, but concerns about personal liability might deter well-qualified persons from taking on these responsibilities if immunity is not provided. The public interest in qualified decision makers may outweigh the private interest in initiating a legal claim.
- ❖ Actions against decision makers are not likely to succeed in any event, and to allow claims to be heard will be a waste of limited court resources and incur unnecessary costs.
- ❖ The person may be required to act or exercise discretion within narrow confines set by statute or by others. If the person is limited in what they can or cannot consider or do, it would be unfair to make them defend a claim related to those decisions. Again, appeal rights or judicial review may be a more appropriate remedy if someone is dissatisfied with the outcome.
- ❖ Concern about possible legal action may hinder timely or effective action. This may be especially true when the nature of the work is such that there is no clear right or wrong action, and even more problematic where the time to fully consider all options may be limited due to other considerations that demand speedy action.
- ❖ In other cases, concern about possible law suits can trigger unnecessary steps being taken and in more extreme cases, the fear of the legal consequences may cause the person to avoid taking any action at all, which may be detrimental to the public interest.
- ❖ If a person is wronged and damages are an unintended result of applying public policy considerations, a better option to legal action may be to re-examine other ways to meet the public policy objectives.
- ❖ No person is infallible, and a person ought not to be unduly exposed to personal liability for an honest mistake made in doing their job. If another entity, like the employer, can be held legally responsible instead, that entity may be more easily able to obtain insurance to protect against honest error, and the cost of such insurance may simply be a cost of doing business.

- ❖ Except when given judicial immunity, a person can still be compelled to appear as a witness, so even if the person is given immunity, and the employer can be named as a party, the person can still be required to give evidence so that the party bringing the suit is not penalized in terms of access to evidence to prove their case.

Some factors not to provide immunity from liability may include:

- ❖ A citizen's ability to access the courts to enforce their rights should not be unnecessarily restricted, and if restricted, the restriction should be only the minimum necessary.
- ❖ The threat of legal action may be an effective way to ensure individuals take proper care in carrying out their duties. In some cases, the potential of legal liability may make a person more careful in how they carry out their duties and obligations.
- ❖ Persons who act under statutory authority should be deterred from acting arbitrarily or beyond their authority.
- ❖ Appeal rights and judicial review may be limited in their availability and provide a less than satisfactory remedy.
- ❖ Although claims for "negligent quasi-judicial activities" may have a relatively low likelihood of success, they should be allowed to proceed in the normal way. The common law develops incrementally over time and the law may now be sufficiently fine-tuned to allow claims of this nature without "opening the floodgates" to claims that are without merit.
- ❖ The Crown and other entities should be liable for their employees the same as other employers. Insurance against liability for employee activities is simply a cost of doing business.
- ❖ Indemnity is a better way to protect decision makers, without unduly restricting citizens' rights.

The next step will be to develop criteria to apply to determine the extent and type of immunity the various entities may need to replace their *Inquiry Act* immunity.

Your thoughts and ideas about statutory immunity and whether and how it should apply to the affected entities are important to assist the AJO in developing criteria to apply to the various entities, and you are invited to share those thoughts and ideas with the Ministry of Attorney General's Administrative Justice Office at:

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Submission of comments by April 28, 2006 would be appreciated.



## APPENDIX A

### ENTITIES WITH *INQUIRY ACT* POWERS, BY TYPE OF ENTITY

<b>Officers of the Legislature and similar entities</b>
<i>Electoral Boundaries Commission Act</i> , s. 6 Electoral Boundaries Commission
<i>Freedom of Information and Protection of Privacy Act</i> , s. 44(1); <i>Personal Information Protection Act</i> , s. 38(1) Information and Privacy Commissioner
<i>Legislative Procedure Review Act</i> , s. 6(b) Speaker of the Legislative Assembly
<i>Members' Conflict of Interest Act</i> , s. 21(2) Conflict of Interest Commissioner
<i>Police Act</i> , s. 61(8) Adjudicator appointed by the Police Complaint Commissioner
<i>Public Service Act</i> , s. 20 Merit Commissioner

<b>Self-Governing Professions</b>
<i>Agrologists Act</i> , s. 28(1) Disciplinary Panel
<i>College of Applied Biology Act</i> , s. 31(1) Disciplinary Panel
<i>Foresters Act</i> , s. 27(5) Disciplinary Panel
<i>Legal Profession Act</i> , s. 44(1): Benchers, a panel or the special compensation fund committee
<i>Notaries Act</i> , s. 27(1) Disciplinary committee
<i>Real Estate Services Act</i> , ss. 42(2), 63(2) 42(2): Discipline committee 63(2): Compensation committee
<i>Teaching Profession Act</i> , ss. 26(5), (7), 32(3) 26(5): Qualifications committee 26(7): The council re: certification inquiries 32(3) The council, discipline committee re: conduct/competence inquiries

<b>Local government</b>
<i>Vancouver Charter</i> , s. 177 177: A barrister engaged to investigate an alleged misfeasance or any matter connected with the good government of the city

<b>Named statutory decision makers</b>
<i>Correction Act</i> , s. 28(2)(f) Director of the Investigation and Standards Office
<i>Debtor Assistance Act</i> , s. 6(b) Director of Debtor Assistance
<i>Employment Standards Act</i> , s. 84 Director of Employment Standards
<i>Financial Administration Act</i> , s. 8(2)(d) Comptroller General
<i>Gaming Control Act</i> , s. 52 General manager
<i>Health Act</i> , s. 15(3) The Provincial health officer
<i>Local Government Act</i> , s. 1021(3) Inspector of Municipalities of British Columbia
<i>Marriage Act</i> , s. 14(2) Marriage commissioner (limited application)
<i>Medicare Protection Act</i> , s. 5(3) Medical Services Commission
<i>Mineral Tenure Act</i> , ss. 13(9), 40(10) The chief gold commissioner
<i>Mines Act</i> , s. 8 An inspector re an accident investigation
<i>Ministry of Energy and Mines Act</i> , s. 8(2)(b) Persons appointed to conduct inquiries and investigations
<i>Private Investigators and Security Agencies Act</i> , s. 19(1) Director of Police Services
<i>Water Act</i> , s. 89 The comptroller or regional water manager re an inquiry

<b>Ministers and others to whom powers may be delegated by statute or by minister typically exercised on an ad hoc basis</b>
<i>Corporation Capital Tax Act</i> , s. 24 Person authorized to make inquiries to ascertain tax liability
<i>Crown Counsel Agreement Continuation Act</i> , s. 4 (4) A Commission regarding bargaining between government and Crown Counsel
<i>Education Services Collective Agreement Act</i> , s. 5(4) A commission to inquire into collective bargaining structures and practices

<i>Environmental Assessment Act</i> , s. 14(4) Commission re project assessment
<i>Environmental Management Act</i> , s. 113(1): The minister or appointee holding an inquiry re: the environment
<i>Health Professions Act</i> , s. 18.1(3) A person appointed to inquire into the administration or operation of a college, or the practice of a health profession.
<i>Labour Relations Code</i> 76(4): Special mediator appointed to help settle collective agreements 79(7): An industrial inquiry commission 109: Special officer appointed to investigate a dispute 144: The minister or designee for the purpose of obtaining information
<i>Logging Tax Act</i> , s. 11(2) An officer appointed to make inquiries re: a taxpayer's income
<i>Ministry of Labour Act</i> , s. 6 The minister or any appointee to obtain information
<i>Provincial Court Act</i> , s. 27(1): A tribunal appointed to inquire into the fitness of a judge to perform their duties
<i>Railway and Ferries Bargaining Assistance Act</i> , ss. 4(a) and 18(3)(b) 4(a) A Special Commission re employer/ employee relations/trade unions 18(3)(b) A fact-finder appointed when needed
<i>Real Estate Services Act</i> , s. 129(2) A person appointed by the minister to review the real estate council, foundation, insurance corporation or any other matter relating to the Act
<i>Youth Justice Act</i> , s. 38(2) The minister or appointee making an inquiry into anything under the Act, based on a complaint

<b>Others</b>
<i>Environmental Management Act</i> , s. 93(11) Environmental Appeal Board
<i>Farm Practices Protection (Right to Farm) Act</i> , s. 11(5) Provincial Board appointed under the <i>Natural Products Marketing Act</i>
<i>Motor Dealer Act</i> , s. 15(7) Motor Dealer Customer Compensation Fund Board
<i>Public Sector Pension Plans Act</i> , s. 7(7) of Sch. A College Pension Board of Trustees
<i>Real Estate Development Marketing Act</i> , s. 29(2) Superintendent of Real Estate

## APPENDIX B

### VARIOUS STATUTORY IMMUNITY PROVISIONS

The statutory immunity provisions set out below are a sample of the various immunity provisions currently in use and are provided to assist in the consideration of the type of immunity provision, if any, that might be given to a particular entity.

<b>Act</b>	<b>Immunity clause</b>
<i>Inquiry Act</i> , [RSBC 1996] c. 224	<b>12</b> A commissioner appointed under this Part has the same protection and privileges, in case of an action brought for an act done or omitted to be done in the execution of the commissioner's duties, as are by law given to the judges of the Supreme Court.
<i>Administrative Tribunals Act</i> , [SBC 2004] c. 45	<b>56</b> (1) In this section, " <b>decision maker</b> " includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.  (2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted  (a) in the performance or intended performance of any duty under this Act or the tribunal's enabling Act, or  (b) in the exercise or intended exercise of any power under this Act or the tribunal's enabling Act.  (3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

<p><i>Crown Proceeding Act,</i> [RSBC 1996] c. 89</p>	<p><b>3</b> (2) Nothing in section 2 does any of the following:</p> <p>(a) authorizes proceedings against the government for anything done or omitted to be done by a person acting in good faith while discharging or purporting to discharge responsibilities</p> <p>(i) of a judicial nature vested in the person, or</p> <p>(ii) that the person has in connection with the execution of judicial process;</p>
<p><i>Child, Family and Community Service Act</i> [RSBC 1996] c. 46</p>	<p><b>101</b> No person is personally liable for anything done or omitted in good faith in the exercise or performance or intended exercise or performance of</p> <p>(a) a power, duty or function conferred by or under this Act, or</p> <p>(b) a power, duty or function on behalf of or under the direction of a person on whom the power, duty or function is conferred by or under this Act.</p>
<p><i>Pharmacists, Pharmacy Operations and Drug Scheduling Act,</i> [RSBC 1996] c. 363</p>	<p><b>69</b> (3) The minister and the government are not liable to pay compensation for an economic loss that may occur as a result of any action taken in good faith under this section.</p>

