THE POWER TO COMPEL EVIDENCE:

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 the power to summon witnesses and evidence; statutory immunity 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 the discussion about the power to summon witnesses and evidence, this paper provides an introduction to some of the legal concepts related to the power to compel evidence and the various types of powers that may be exercised to obtain evidence, including *Inquiry Act* and ATA provisions. Options and alternatives to summoning evidence are then followed by some of the policy considerations for and against providing this power. The next step will be to develop criteria to apply to the various affected entities, to determine the extent and type of contempt powers a particular entity may need to replace their *Inquiry Act* powers.

Your thoughts and ideas about the power to summon evidence 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

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

2 The Power to Compel Evidence

Evidence is information that tends to either prove or disprove a fact. In resolving disputes, the production of evidence can be critical to making informed decisions. Access to the best evidence will usually mean a better informed decision can be made.

Sometimes for a decision maker to have access to evidence, persons must be ordered to appear at a designated place and time to answer questions, often under oath or affirmation. In addition, it may be necessary to order the person to bring documents or other physical things with them and to answer questions about those documents or other things. The power to order a person to appear and to produce documents is known as the power to compel evidence.

The official documents that are used to compel a person to attend and present evidence at a proceeding are called "subpoenas" and "summons". While often used interchangeably,[1] the term subpoena is usually used in BC civil court proceedings, and the court has rules on how and when to get a subpoena. In proceedings of BC tribunals and other entities, orders to attend are usually referred to as summons.[2] The procedures for issuing summons are usually set by the particular tribunal or entity and can vary.

3 The Court's Power to Compel Evidence

Under the common law,[3] superior courts, such as the BC Supreme Court,[4] have the inherent power to compel evidence in their proceedings.

The court subpoena process is typically used to obtain evidence from a person who is not a party to the court proceeding. Subpoena powers are in addition to a party's right to question the other party under oath and to see the other party's documents that relate to the matter in advance of the court hearing, which are called *discovery rights*.

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[1] Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure before Administrative Tribunals* (Toronto: Carswell, 1988-), pp. 12-83 and 12-84.

[2] There may have been a historical difference in the use of these terms. Under the *Criminal Code of Canada (*and the BC *Offence Act)*, attendance of an accused or defendant is compelled by issuing a summons, while witnesses are issued subpoenas. A summons may only be issued by a justice who considers that a case is made out for compelling an accused to attend court and answer to a charge of an offence. Subpoenas to witnesses must be signed by a judge, justice or clerk of the court.

[3] Common law is made by judges, building on earlier cases (precedents) which can involve interpreting and applying statutes.

[4] "Superior" courts are the courts where the judges are appointed by the federal government.

The Court Rules set out the procedures for issuing a subpoena in a Supreme Court matter.[5] A party may simply prepare a subpoena in the prescribed form and serve it on any person. The court's prior approval does not need to be obtained, and the subpoena does not need to be filed in the court registry. The subpoena may require that the person bring to the hearing any document in the person's possession or control relating to the matters in question, without specifically identifying the documents, although a physical object the person is to bring must be specifically identified.

To be enforceable, a subpoena must be served on the person and fees paid to the person to attend and for travel, meals, accommodation and preparation. The amount of the fees is set by the Court Rules.[6] The fees for travel, meals and accommodation are intended to reasonably approximate actual expenses, but the attendance fees ($20 per day) are not expected to compensate for lost wages. [7]

Expert witnesses are not usually subpoenaed, as their evidence is typically given at the request and expense of the party calling the expert. (There are Court Rules that specifically address expert witnesses.)

If personally served with the subpoena and the appropriate fees are paid, the person must appear on the date and time, unless they take steps to have the subpoena set aside. A failure to appear can be punished by contempt (which is the subject of another paper in this series, which will be available on the AJO Web site at: http://www.gov.bc.ca/ajo/).

A person can apply to have a subpoena set aside on the basis that it would create a hardship for the person, such as where the person is ill and physically unable to attend, or that their attendance is unnecessary because they have no relevant evidence to provide, they are not the best source of evidence or the only evidence that they could provide is privileged. (The exception for privileged evidence is discussed in more detail below.) If the party who served the subpoena still wants the person to attend, they must respond to the application to set the subpoena aside, and establish for the court that the presence of the witness is important to determining the matter.

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[5] See Rule 40 of the Supreme Court Rules.

[6] See Schedule 3 of the Supreme Court Rules for current witness fees.

[7] *Northland Properties Ltd. v. Equitable Trust Co.*, 1992 CanLII 2360 (B.C.S.C.) This is seen as part of the public good in terms of justice being done, even if it requires sacrifice on the part of persons who have no interest in the outcome.

4 The Power to Compel Evidence under the *Inquiry Act*

Unlike the superior courts, commissioners, tribunals and other entities that may need evidence to carry out their duties do not have the common law power to compel evidence; these individuals and entities can only compel a person to give evidence if given that authority by statute.

Section 15 of the *Inquiry Act* gives a commissioner appointed under that Act the authority to issue a summons requiring a person to attend an inquiry, answer questions and bring and produce documents.[8] This authority is quite broad, but has some limits.

The person must bring all documents in their control or possession that touch or in any way relate to the subject matter of the inquiry, and answer questions that relate to that subject matter. This would seem to set a broad scope in terms of the nature of the documents and the questions that may be asked (sometimes referred to as a "low threshold" with respect to relevancy).

However, while section 15 allows a commissioner to issue a summons to a person to appear at the inquiry, it does not authorize a commissioner to issue a summons to a person to answer questions or for their documents be examined, in advance of the actual inquiry hearing.[9] This may mean an *Inquiry Act* summons is not available as a pre-hearing tool to require production of documents in advance in order to determine what evidence a person may be able to give, which can often be a valuable way to effectively manage complicated hearings, or even to resolve matters without the need for a hearing.

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[8] Set out in Appendix B.

[9] In *Parker v. B.C.*, 1990 CanLII 2181 (BC S.C.), the Court held:

> "In essence the Petitioners were seeking a form of "document discovery" prehearing. The Board's power in regard to document production is found in section 15 (1) of the Inquiry Act, which reads:
>
> > "The commissioners acting under a commission issued under this part, by summons, may require the attendance as a witness, at a place and time mentioned in the summons, which time shall be a reasonable time from the date of summons, of any person, and by summons require any person to bring and produce before them all documents, writings, books, deeds and papers in his possession, custody or power touching or in any way relating to or concerning the subject matter of the inquiry."
>
> I do not interpret that section to allow the Board any power to have documents produced to a party to the appeal. It does permit a summons to issue requiring a person to produce the documents at the hearing. The Board being a creature of statute has no inherent jurisdiction to depart from the confines of section 15 (1)."

See also: *CP Air v. C.A.L.P.A.* [1993] 3 S.C.R. 724

Also, the type of evidence that can be compelled is limited to oral testimony or "documents, writings, books, deed and papers", so it may be that an order could not be made with respect to things, such as electronic records, that are not "documents".

Unlike the Court Rules, which set out the process to issue a subpoena, the *Inquiry Act* does not set out any process to be followed to issue a summons, but it does require that the time set for the person to appear must be a reasonable time from the date of the summons.

Application of section 15 of the Inquiry Act to other entities

Over 45 statutes provide various individuals and entities with the power to compel evidence by adopting section 15 of the *Inquiry Act*. Those statutes and the individuals and entities protected are listed in Appendix A.

These individuals and entities have a broad range of authority. Some of these entities are responsible for making decisions, while others conduct investigations, make recommendations or engage in fact-finding. Some have responsibility for broad public policy decisions or recommendations, such as the Information and Privacy Commissioner and the Electoral Boundaries Commission. Others make decisions in more private matters, such as the Chief Gold Commissioner or the Director of Debtor Assistance. Some are ministerial delegates with power to conduct inquiries into various specified matters like health or safety standards. Discipline and certification committees of a number of self-regulating professions, including biologists, lawyers, notaries and teachers have also been granted the power to compel evidence. These entities' need for evidence in order to carry out their duties will vary.

5 The Power to Compel Evidence under the *Administrative Tribunals Act* and other Acts

The *Administrative Tribunals Act* ("ATA") provides comprehensive powers and makes consistent authorities available to various quasi-judicial decision makers in BC, including the authority under section 34 to compel evidence by issuing a summons.[10]

The scope of the power to compel evidence under section 34 is, in some senses, broader than the authority granted under section 15 of the *Inquiry Act*. In particular, section 34 provides authority for orders for:

[10] Set out in Appendix B. The ATA provisions are applicable to an entity and its proceedings only if adopted by reference under the entity's enabling legislation.

- documents to be produced to either or both of the tribunal or another party to the tribunal proceedings,
- documents to be produced either during or before a hearing, and
- things other than just documents to be produced.

The person can be compelled to bring all things in their control or possession that are "admissible and relevant to an issue in the application" and to answer questions within that same scope. This may be slightly less broad than the *Inquiry Act's* requirement to produce things and answer questions that "touch or in any way relate to the subject matter of the inquiry", so that the relevancy threshold for production under Section 34 may be higher (more strict) than section 15 of the *Inquiry Act*.

It has been suggested that the use of the words "in an application" in section 34 are also limiting, and the tribunal must have jurisdiction over the application. and that it cannot use the summons power to obtain documents in deciding whether it has jurisdiction.[11]

While section 34(1) permits a party to an application to issue a summons, this section has been adopted for only two tribunals,[12] in recognition that in certain kinds of hearings, a party should not be entitled to just summons anyone the party chooses, without the tribunal first considering the need for the evidence and whether a summons should be used.

Section 34(3) permits the tribunal itself to issue a summons, which can be exercised on its own initiative or may be on the request of a party.[13] This allows the tribunal to consider whether and when to issue a summons and to keep more control over its proceedings. The ability to order production in advance of a hearing (sometimes called *discovery rights*) can be a valuable tool to resolve hearings without the need for a formal hearing.

Under section 34(3), a tribunal may make an order requiring a person (not just a party or intervener) to attend a hearing to give evidence or to produce a document or other thing in the person's possession or control, including a corporate entity. Documents created specifically for settlement under a tribunal's dispute resolution processes are exempt from any order for disclosure.

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[11] In *Hospital Employees' Union et al v. Canadian Forest Products Ltd. et al*, 2005 BCSC 877 (CanLII) on the review of a decision to issue summonses on a jurisdictional question, the court held that the test of a serious question to be tried was met, the court having been advised that "the likely reason that the issue has not been litigated is that, until recently repealed by the *Administrative Tribunals Act,* S.B.C. 2004, c. 45, the *Inquiry Act* R.S.B.C. 1996 c. 224 provided broader summonsing power than the *Labour Code*, and was not tied to there being a complaint within the Board's jurisdiction."

[12] The Community Care and Assisted Living Appeal Board and the Hospital Appeal Board

[13] Adopted for ten tribunals.

Section 11 of the ATA permits a tribunal to make rules concerning its powers including witness fees and expenses and to set aside a summons. If a tribunal makes rules, it must make those rules accessible to the public.

Section 34(4) provides the tribunal may apply to the court for an order directing a person to comply with an order to attend or produce documents.

Sections 34(3) and (4), providing a tribunal with the power to obtain evidence that may be necessary for it to determine an issue in a proceeding before the tribunal, can be especially useful in situations where dismissing the application or limiting submissions for non-production of evidence is not an effective alternative. Some examples of when section 34(3) and (4) may be useful include:

- If a party has evidence the tribunal needs to make its decision, but the party is unwilling to produce it and does not care if the tribunal limits his or her right to make submissions or dismisses the appeal (see section 18 of the ATA); and
- If the proceeding has a broader public interest and evidence the tribunal needs in order to make its decision is available only through a person who is not a party and the person is unwilling to provide the evidence.

Requirements to ordering attendance or production under section 34(3):
The ATA does not set any pre-conditions to or process for the issuance of such an order and is silent on whether the parties have any right to request an order or to make submissions on whether such an order should be issued. This suggests that the tribunal has discretion as to how or when it will exercise this power.

Other statutes: Instead of powers under the ATA or the *Inquiry Act*, many individuals and entities have evidence compulsion powers set out in their own specific legislation. Some examples are included in Appendix B. In addition to the general limitations on the power to compel evidence set out below, a particular entity's power to compel evidence may be limited by the specific provisions of its enabling statute.

6 Limits on the Power to Compel Evidence

Regardless which statute gives an entity the authority to compel evidence, a person who is served with a summons can apply to the entity that issued it or to the court to have the summons "vacated" (i.e. rendered void), so that the person does not have to comply with it.[14] If an application is made to the issuing entity

[14] See discussion under part 3 above, and also see *Woolley v. College of Physicians and Surgeons (British Columbia)*, [1996] 6 W.W.R. 716 (B.C.S.C.) and *Cannon v. Royal Canadian Mounted Police Assistant Commissioner* (1997) 6 Admin. L.R. (3d) 246 (Fed. T.D.), cited in Macaulay and Sprague at 12-90.4, note 223.1. Note, however, that if the challenge is on constitutional grounds such as those discussed on pages 11-13, and section 43, 44 or 45 of the ATA applies to the entity, certain considerations arise. If section 43 or 45 applies and the constitutional question does not relate to the Charter, the tribunal has jurisdiction to decide the question, or to refer the question to the Court, but if the Attorney General requests, the tribunal

and it refuses to vacate the summons, the person may still be able to apply to the court for judicial review.[15]

The summons power must be exercised in compliance with the common law and the *Charter of Rights and Freedoms* ("the Charter"), plus any limits under the specific statute granting that power. This section highlights some of the limits on exercising this power.

Common Law

Evidence regarding reasons for a decision can not be compelled: In keeping with the general principles of judicial independence, judges, justices of the peace and tribunal members can not be compelled to give evidence regarding their grounds for a decision.[16] They may, however, be compelled to give evidence about matters that are outside their judicial capacities.

Privileged evidence can not be compelled:

Privileged information, including communications between a lawyer and client for the purpose of obtaining legal advice, cannot be compelled. The Supreme Court of Canada has suggested ten "principles" that would govern searches to ensure that solicitor-client privilege is protected.[17] Presumably these principles would apply likewise to documents produced in response to a summons where solicitor-client privilege is claimed.

Members of Parliament and of the Legislature cannot be subpoenaed as witnesses in court proceedings while the House is in session. And Cabinet ministers may claim that documents are privileged and should not be compelled. Under section 37 of the *Canada Evidence Act*, a Minister of the Crown or other official may object to the disclosure of information to a person with the authority to compel the information by certifying that the information should not be disclosed on the grounds of a specified public interest. Section 38 of that Act also prohibits the compulsion of evidence that could injure international relations, national defence or national security unless the public interest in disclosure outweighs in importance the public interest in non-disclosure.

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must refer the question to the Court. If section 44 applies, or section 45 applies and the constitutional question relates to the Charter, the tribunal has no jurisdiction to hear it. In these circumstances, only the court would have jurisdiction to consider the question. ,

[15] *Quebec (Attorney-General) v. Canada (Attorney-General)* (1978) 90 D.L.R. (3d) 161 (S.C.C.), cited in Macaulay and Sprague at 12-90.4.

[16] *Mackeigan* v. *Hickman*, [1989] 2 S.C.R. 796; *R. v. Celmaster*, 1994 CanLII 3080 (BC S.C.).

[17] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209

Private information may be compelled
Provincial privacy legislation does not apply to limit the information available by law to a party to a proceeding.[18] However, if a person objects to the disclosure of private information, the entity may review the information to ensure some level of protection of a person's privacy and confidentiality interests.[19]

Charter Rights
Exercising the power to compel must not deprive a person of their liberty, except in accordance with the principles of fundamental justice: Under section 7 of the Charter, everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except "in accordance with the principles of fundamental justice", so there are two aspects to consider: deprivation of liberty and exceptions in accordance with the principles of fundamental justice.

The Supreme Court of Canada has concluded that a statutory authority to compel evidence does not contravene section 7 rights to liberty, provided the overall purpose of the statute is the "furtherance of a goal which is of substantial public importance" or where the proceeding "serves an obvious social utility."[20]

Applying this test, the courts have upheld the authority to compel evidence in such matters as the regulation of the securities industry, regulation of trade and competition and professional disciplinary proceedings.[21]

And while an administrative tribunal can generally set their own procedures, they must meet the principles of fundamental justice (which embrace the requirements

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[18] See section 3(2) of the *Freedom of Information and Protection of Privacy Act* (FOIPPA) and section 3(4) of the *Personal Information Protection Act*. Note however, that despite these provisions, limitations may exist in certain circumstances. For example, in *Chilliwack School District No. 33 v. Chilliwack Teachers' Association,* the Court considered whether *FOIPPA* s. 3(2), combined with two other FOIPPA provisions, had the effect of negating the FOIPPA s. 33 prohibition against disclosure of information by public bodies. The Court noted the arbitrator's conclusion that those provisions did have such a negating effect, but expressed no view on that conclusion, instead offering the opinion that

> "the answer to that question must depend upon the particular context in which the issue arises. Which public body is affected? What are the particular circumstances? And so on."

[19] In *Shilton v. Fassnacht* 2006 BCSC 431, the Court looked at *Personal Information Protection Act* s. 3(4) and ruled that while there is nothing in the *Act* that would limit the defendant's right under Supreme Court Rule 27(22) to obtain the names and contact information of relevant witnesses, all contested issues of disclosure "require a balancing of competing interests". Applying this principle, the court denied an application for disclosure of banking records and credit card statements which were sought to demonstrate "how well or how poorly the plaintiffs have been able to manage their financial affairs after the motor vehicle accident" to determine the extent of their injuries resulting from the accident.

[20] *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3.

[21] In no case reviewed when researching this paper was a statutory power to compel evidence found to be contrary to section 7.

of procedural fairness), plus any limits set by their enabling statute.[22] What will be sufficient to meet the requirements of procedural fairness will depend on the rights being affected by the tribunal and the nature of the overall statutory scheme in which it operates.

Although what will be required to meet the principles of fundamental justice may vary, a person may be able to successfully oppose a summons on the basis of a lack of procedural fairness if the summons was not issued far enough in advance of the hearing date to make compliance reasonably possible, or if the entity refuses to hear from the person why they should not have to comply with the summons.

Exercising the power to compel must not be an unreasonable seizure:
Section 8 of the Charter protects against unreasonable search and seizure. Again, there are two elements: is a summons a "seizure" and if so, is it unreasonable.

The courts have found that a summons to produce documents constitutes a "seizure" within the meaning of section 8 but whether the seizure is reasonable will depend on a number of factors, including:

- the expectation of privacy of the person who is being compelled to produce,
- the nature of the intrusion, and
- the purpose of the seizure. [23]

Applying these factors, the courts have held that statutory provisions that authorize entities to order production of documents from persons involved in regulated industries, such as securities trading, meet the test of reasonableness under section 8.[24] This is because people who participate in these types of industries have a relatively low expectation of privacy.

Generally the intrusion on a person's privacy by complying with a summons to produce documents is much less than the intrusion, for example, of a physical search of a person's home or business.

Even where the legislative scheme that authorizes the person or the documents to be summoned is considered reasonable (for example, to regulate for the public good), a particular summons within that scheme may be found to be unreasonable. To avoid being found unreasonable, a summons should identify any documents to be produced with reasonable particularity, and the description should not be too broad or too general. There should be a "rational link" between

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[22] *Cannon v. Canada (Assistant Commissioner, RCMP) (T.D.)*, [1998] 2 F.C. 104.

[23] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.

[24] *British Columbia Securities Commission v. Branch*, *supra*, note 20.

the documents requested and the issues that are the subject of the proceeding. While this does not mean that the entity must make a determination on the relevancy of the requested evidence before issuing the summons, the summons should not be speculative or amount to a "fishing expedition." Also, the summons should not subject a person who is not a party to the proceedings to an onerous search for documents.[25]

Evidence can be compelled from a person even if the evidence required to be given might be against their own interests. Section 11 of the Charter protects a person who is charged with an offence from being compelled to be a witness in those offence proceedings. However, the Supreme Court of Canada has found that section 11 rights do not apply to "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity".[26]

In that case, the Court also said: "Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable."[27]

Section 11 will likely only apply to evidence before an administrative tribunal or other entities if the tribunal or entity can impose significant consequences for non-compliance, such as "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity."[28]

Witnesses can be compelled to provide incriminating evidence: Section 13 of the Charter protects a person who testifies in a proceeding from having that evidence used to incriminate the person in another proceeding (except in a prosecution for perjury or for the giving of contradictory evidence, for example, when a witness gives evidence in one proceeding that contradicts the evidence he or she gave in another proceeding).

Section 4 of the BC *Evidence Act* also provides some protection for witnesses against the use of testimony in subsequent civil proceedings.[29]

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[25] James E. Dunn, "Subpoena Duces Tecum" (1983) 4 Advocates' Quarterly 94 at 98.

[26] *R. v. Wigglesworth* (1987), 45 D.L.R. (4th) 235.

[27] *R. v. Wigglesworth* at 251.

[28] *Ibid*. at 252.

[29] That section reads:

This means an entity can compel a person to give evidence, even if the evidence might incriminate the witness in another proceeding. However, the predominant purpose for seeking the evidence must be a legitimate public purpose, and not simply to obtain incriminating evidence against the person who is being compelled to testify.[30]

Constitutional limits

The provincial legislature does not have constitutional authority to compel federal officials to give evidence, so it cannot give provincial entities that power.

Persons outside the province can not be compelled

The jurisdiction of a provincially created entity does not extend past provincial borders. However, an entity may be given the express power to obtain the assistance of the court in the jurisdiction where the person is located. For example, section 175 of the BC *Securities Act* authorizes the Supreme Court to request the assistance of the appropriate judicial authority in obtaining evidence on behalf of the Securities Commission.

While the *Subpoena (Interprovincial) Act* does not apply to tribunal and other statutory entities to obtain evidence from persons in other Canadian jurisdictions[31], BC entities may be able to obtain deposition evidence from witnesses located in the United States under the *United States Code*.[32]

> 4 (1) In this section, **"witness"** includes any person who testifies in the course of any proceedings authorized by law.
> (2) A witness must not be excused from answering a question or producing a document on the ground that the answer or the document may tend to incriminate the witness or any other person, or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act.
> (3) If a witness objects to answering a question on any of the grounds referred to in subsection (2), and if, but for this section or any Act of Canada, the witness would have been excused from answering the question, then, although the witness is by reason of this section or by reason of any Act of Canada compelled to answer, the answer given must not be used or receivable in evidence against that witness in any civil proceeding or in any proceeding under any Act.

[30] *R. v. S. (R.J.),* [1995] 1 S.C.R. 451.

[31] The *Subpoena (Interprovincial) Act* authorizes a court to issue a subpoena to a witness outside of the province and to ask the court with jurisdiction over the witness to adopt the subpoena and compel the witness to attend the proceeding in the issuing court. However, "court" is defined in section 1 of that Act as "any court in a province of Canada" and does not include administrative tribunals or other statutory entities.

[32] Section 1782 of Title 28 of the *United States Code* provides, in part, as follows:

> 1782. Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals
> (a) The district court of the district in which a person resides or is found may order him to give his testimony…for use in a proceeding in a foreign or international tribunal…The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person.

7 Alternatives to Issuing a Summons

A summons will not always be necessary to obtain evidence in all circumstances, and in some circumstances, proceeding without the best evidence may be acceptable. Voluntary production by making a request or applying the burden of proof or a negative inference may be sufficient in some cases. In other circumstances, where additional or better evidence is required, other means may be used. These are discussed below.

Request to provide evidence: In some circumstances, a simple request will be enough for a person to attend at a hearing, particularly where the person has an interest in the matter. As part of its pre-hearing process, an entity may request a person agree to appear as a witness. A summons will only need to be considered if the person indicates that they will not comply with the request.

Burden of proof: A party to a proceeding may have the obligation to produce sufficient evidence in support of a fact or issue. It is up to that party to provide the evidence necessary to do that, or the party will be unsuccessful. However, simply applying the burden of proof may not be sufficient where the best evidence to prove a fact is in the possession of a third party who is not interested in the proceeding or opposes co-operating, or in cases where the proceeding is in a broad public interest and no party is required to prove the fact.

Negative inference: If the party does not produce a document or other thing that they would be expected to produce to prove their case, and no reasonable explanation is provided for not providing it, the decision maker or person conducting the inquiry or investigation can "draw a negative inference". This means they may infer that the evidence would have been unfavourable to the party who failed to produce the document or thing. An adverse or negative inference can also be drawn where a person who reasonably could have been expected to assist the party, fails to give evidence which was in their power to give. Applying a negative inference may not be the best option where the proceeding is in a broad public interest and no party is required to prove the fact.

Seizure of evidence during inspections and investigations: A number of statutory entities have the authority to search for and seize documents or obtain oral evidence during inspections or investigations.[33] This evidence can then be

[33] For example, under section 85(1) of the *Employment Standards Act*, the director has the authority to:
(a) enter during regular working hours any place, including any means of conveyance or transport, where
(i) work is or has been done or started by employees,
(ii) an employer carries on business or stores assets relating to that business,
(iii) a record required for the purposes of this Act is kept, or
(iv) anything to which this Act applies is taking place or has taken place;

used at a hearing, without needing to compel the attendance of a person (unless another party wants to question or cross examine the person about the evidence).

To avoid infringing on a person's rights under section 8 of the *Charter of Rights and Freedoms,* a search or seizure conducted under this type of authority must meet the test of reasonableness. What will be considered reasonable will vary with the context of the search or seizure, for example, an inspection, during business hours, of the premises and documents of a regulated business is likely to be considered reasonable.

Applications to the BC Supreme Court: Some statutes expressly provide that an entity can apply to the BC Supreme Court for an order allowing the seizure of evidence or to compel the attendance of witnesses or the production of documents in a proceeding that is not a court proceeding.[34] (This express authority may be unnecessary, because under the common law the Supreme Court has the inherent jurisdiction to issue subpoenas to assist administrative tribunals and other statutorily created entities in carrying out their responsibilities.)[35] However, unlike a party to a court proceeding (who can simply serve a subpoena on a person) the entity must make a court application, serve the person with the application, and convince the court of the need for the

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(b) inspect, and question a person about, any work, material, appliance, machinery, equipment or other thing in the place;
(c) inspect any records that may be relevant to an investigation under this Part;
(d) on giving a receipt for a record examined under paragraph (c), remove the record to make copies or extracts;
(e) require a person to disclose, either orally or in writing, a matter required under this Act and require that the disclosure be under oath or affirmation;
(f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

[34] For example, see section 20 of the *Accountants (Chartered) Act:*
(2) If the officer, committee or person is satisfied on reasonable and probable grounds that a member or student possesses any information, record or thing which is relevant to an investigation of a current or former member or a student or a practice review of a member, the officer, committee or person may make a written request to the member or student requiring the member or student to answer inquiries of the officer, committee or person relating to the investigation or practice review and to produce to the officer, committee or person the record or thing for examination.
(3) A member or student who receives a request under subsection (2) must comply with the request.
(4) If a member or student who receives a request under subsection (2) refuses or neglects to promptly comply with the request, the institute may apply to the Supreme Court for an order requiring the person to comply.
(5) The Supreme Court, on being satisfied that a person has contravened subsection (3), may order that the person comply and may impose requirements as to time and manner of compliance.

[35] *Canada Deposit Insurance Corp. v. Code* (1988), 49 D.L.R. (4th) 57 (Alta C.A.).

documents,[36] which will be more time consuming and costly than simply issuing its own subpoena.

In their governing legislation, certain committees of various self-governing professions have both the power to compel evidence themselves under section 15 of the *Inquiry Act* and the authority to apply to the Supreme Court for a subpoena.[37]

8 Policy Discussion

Having canvassed various aspects of the power to compel evidence and some alternatives, the preliminary questions that need to be asked about relying on section 15 of the *Inquiry Act* are:

- whether a particular position or entity requires evidence to carry out its duties,
- if that evidence is not voluntarily produced, whether the entity needs the power to compel it be produced,
- if the power to compel evidence is required, what is the extent of that power, and
- whether there should be any limits or process requirements on the exercise of the power to compel evidence.

To answer those questions requires consideration of the possible implications to the various parties who may have an interest: the individuals and entities that may be granted the power to compel evidence, the persons whose rights may be limited or restricted by the power to compel evidence, and the general public who may also have an interest in these matters. To assist in that consideration, some of the factors that might be considered are set out below.

Some of the factors why an entity should be given the power to compel evidence or that power might be limited may include:

- The better the evidence, the better the decision:
  - The accuracy of factual determinations will likely be improved by ensuring the decision maker has access to relevant information.
  - For the parties and the public to have confidence in the decision making process, they need to be assured the best possible decisions are being made, which may require evidence being compelled.

[36] See Rule 10 of the Supreme Court Rules.

[37] For example, see the *Agrologists Act*, *College of Applied Biology Act* and the *Foresters Act*.

- Where the finding, decision or recommendation to be made involves the public interest, it may be appropriate for an entity to have the power to compel evidence so that the public interest is best considered.

- If a party is given a right to make a claim or defend themselves against an allegation, they should be able to ask the decision maker to help them get the best evidence to do that.

- Persons may be more likely to attend a hearing or inquiry and present evidence if there is a lawful obligation and even more likely to do so if there are consequences for failing to attend.

  - Persons may be unwilling to voluntarily attend a proceeding and provide evidence on a simple request. They may want to avoid being seen to be taking sides in a dispute.

  - Many employers will not allow an employee to simply leave work to attend a proceeding unless they have been subpoenaed or summoned as a witness.

- The ability to compel evidence be produced in advance of a hearing may help resolve matters without a hearing, or if a hearing is still necessary, to ensure the hearing proceeds smoothly, without unnecessary adjournments due to unexpected evidence.

- The rules of natural justice and procedural fairness generally require an opposing party have the opportunity to question or cross-examine witnesses. The power to compel evidence may be needed to ensure this opportunity is available.

Some factors why an entity might not be given the power to compel evidence may include:

- A person may find it inconvenient or difficult to take time away from work or other obligations in order to present evidence.

- Harm may occur if a person is compelled to disclose personal or incriminating information that may embarrass or cause damage to the person's reputation.

- If a person fails to comply with a summons, the person may be apprehended, imprisoned and ordered to pay costs.

- The power to compel evidence reflects the public interest in the administration of justice. If an entity's activities do not affect the public

interest, it may not be appropriate for the entity to have the power to compel evidence.

- Other options to obtain evidence may strike a more appropriate balance between the rights of individuals and the need for complete and accurate evidence.

The following factors may be considered when examining whether the power to issue a summons is the most appropriate method for an entity to obtain evidence and any limits that might be placed on that power:

- Applications to the Supreme Court will be more costly and time-consuming than an entity simply issuing a summons directly.

- Neither the *Inquiry Act* nor the ATA outline the process for issuing or challenging summons. Subpoenas issued by the Supreme Court are governed by detailed procedures set out in the Supreme Court Rules that ensure payment of witness fees and provide a process for how a subpoena may be set aside. (However, section 11 of the ATA permits a tribunal to make rules concerning its powers including witness fees and expenses and to set aside a summons. And if a tribunal makes rules, it must make those rules accessible to the public.)

- The Supreme Court has inherent jurisdiction to make orders to assist the activities of administrative tribunals. A tribunal may be able to apply to the Supreme Court for an order compelling the attendance of a witness, even without express statutory authority to make the request.

- Applications to the Supreme Court for orders or subpoenas allow for court review of the reasons why a witness should be compelled and some determination of the relevancy of the evidence sought.

- The power to obtain evidence during an investigation is suitable for an entity that has an investigatory function but may not be suitable for an entity that has only adjudicative functions. Under the adversarial model of decision making, parties present evidence to a neutral decision maker; decision makers do not collect evidence themselves.

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

Your thoughts and ideas about the power to compel evidence 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:

PO Box 9210 Stn Prov Govt
Victoria, BC
V8W 9J1

Fax: 250-387-0079

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

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

APPENDIX A

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

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

Self-Governing Professions
Agrologists Act, s. 28(1) Disciplinary Panel
College of Applied Biology Act, s. 31(1) Disciplinary Panel
Foresters Act, s. 27(5) Disciplinary Panel
Legal Profession Act, s. 44(1): Benchers, a panel or the special compensation fund committee
Notaries Act, s. 27(1) Disciplinary committee
Real Estate Services Act, ss. 42(2), 63(2) 42(2): Discipline committee 63(2): Compensation committee
Teaching Profession Act, 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

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

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

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

Environmental Assessment Act, s. 14(4) Commission re project assessment
Environmental Management Act, s. 113(1): The minister or appointee holding an inquiry re: the environment
Health Professions Act, s. 18.1(3) A person appointed to inquire into the administration or operation of a college, or the practice of a health profession.
Labour Relations Code 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
Logging Tax Act, s. 11(2) An officer appointed to make inquiries re: a taxpayer's income
Ministry of Labour Act, s. 6 The minister or any appointee to obtain information
Provincial Court Act, s. 27(1): A tribunal appointed to inquire into the fitness of a judge to perform their duties
Railway and Ferries Bargaining Assistance Act, 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
Real Estate Services Act, 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
Youth Justice Act, s. 38(2) The minister or appointee making an inquiry into anything under the Act, based on a complaint

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

APPENDIX B

EVIDENCE COMPULSION POWERS UNDER VARIOUS STATUTES

The statutory compulsion powers set out below are a sample of the various types of compulsion powers currently being used, and are provided to assist in the consideration of the type of compulsion power, if any, that might be given to a particular entity.

Act	**Evidence Compulsion Provision**
Inquiry Act, [RSBC 1996] c. 224	**15** (1) The commissioners acting under a commission issued under this Part, by summons, may require a person (a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and (b) to bring and produce before them all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry. (2) A person named in and served with a summons must attend before the commissioners and answer on oath, unless the commissioners direct otherwise, all questions touching the subject matter of the inquiry, and produce all documents, writings, books, deeds and papers in accordance with the summons.
Administrative Tribunals Act, [SBC 2004] c. 45	**34** (1) A party to an application may prepare and serve a summons in the form established by the tribunal, requiring a person (a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in the application, or (b) to produce for the tribunal, that party or another party a document or other thing in the person's possession or control that is admissible and relevant

	to an issue in the application. (2) A party to an application may apply to the court for an order (a) directing a person to comply with a summons served by a party under subsection (1), or (b) directing any directors and officers of a person to cause the person to comply with a summons served by a party under subsection (1). (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person (a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or (b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application. (4) The tribunal may apply to the court for an order (a) directing a person to comply with an order made by the tribunal under subsection (3), or (b) directing any directors and officers of a person to cause the person to comply with an order made by the tribunal under subsection (3).
Auditor General Act, [SBC 2003] c. 2	**17** (1) The Auditor General may (a) summons the attendance of witnesses, (b) request that witnesses give evidence on oath or in any other manner, and (c) request that witnesses produce records, securities and things for the purposes of section 11 or of an examination undertaken under section 13.

Coroners Act [RSBC 1996] c. 72	**37** (1) A coroner may issue a summons to any person who, in the opinion of the coroner, might be able to give material evidence on the matters to be inquired into at the inquest. (2) A summons issued under subsection (1) must be served by a peace officer leaving a copy of it with the witness. (3) The original summons may contain the names of any number of witnesses, but each copy of it need only contain the name of the witness on whom it is served. (4) A coroner has the same powers to compel the attendance of witnesses and to punish a witness for disobeying a summons to appear, refusing to be sworn, or refusing without lawful excuse to give evidence as are conferred on a justice by the *Offence Act.*
Ombudsman Act, [RSBC 1996] c. 340	**15** (1) The Ombudsman may receive and obtain information from the persons and in the manner the Ombudsman considers appropriate, and in the Ombudsman's discretion may conduct hearings. (2) Without restricting subsection (1), but subject to this Act, the Ombudsman may do one or more of the following: (a) at any reasonable time enter, remain on and inspect all of the premises occupied by an authority, talk in private with any person there and otherwise investigate matters within the Ombudsman's jurisdiction; (b) require a person to furnish information or produce, at a time and place the Ombudsman specifies, a document or thing in the person's possession or control that relates to an investigation, whether or not that person is a past or present member or employee of an authority and whether or not the document or thing is in the custody or under the control of an authority;

	(c) make copies of information furnished or a document or thing produced under this section; (d) summon before the Ombudsman and examine on oath any person who the Ombudsman believes is able to give information relevant to an investigation, whether or not that person is a complainant or a member or employee of an authority, and for that purpose may administer an oath; (e) receive and accept, on oath or otherwise, evidence the Ombudsman considers appropriate, whether or not it would be admissible in a court.