

Access to Police Records and Liability under the *Police Act* October 2017

The BC Government has the opportunity to meaningfully improve access to justice for people impacted by harmful police conduct by reforming document disclosure requirements, extending limitation periods, and amending the *Police Act* to address existing police department liability issues.

Under the *Police Act*, s 20, municipalities are liable for the torts committed by any municipal police officer or employee of the police board. This liability scheme has and continues to limit access to justice for people whose rights are violated by police, specifically:

- Subsequent to the BCSC decision in *Henry v. British Columbia*, 2014 BCSC 1018, documents held by a police department are not subject to the regular rules of document disclosure because the municipality, not the police department or board, is named in litigation. This often requires litigants to pursue third-party document disclosure orders, resulting in significant court delay and expense to plaintiffs.
- The *Police Act* is clear regarding the liability for torts committed by police officers, but is silent on the issue of *Charter* violations committed by officers. This lacuna in the legislation has caused uncertainty in the law, as considered in *BC/Yukon Association of Drug War Survivors v Abbotsford (City)*, 2015 BCCA 142. One troubling outcome of this ambiguity is the argument, made by the City of Abbotsford before the Court of Appeal, that any declaratory order made regarding the constitutionality of the actions of a police department would be of no utility because the municipality is a separate legal entity with no control over the police department's actions or policies.
- Beyond the lacuna in the legislation regarding liability for *Charter* breaches committed by police officers, further attention is needed in relation to the liability scheme under the *Police Act* generally. One of the primary goals of awarding damages for wrongdoing is to deter further wrongdoing. Currently, damages awarded in cases of police misconduct are ordered against municipalities and paid directly by municipalities. This means that police departments do not incur the budgetary implications of an award of damages from their existing yearly budgets. Departments, therefore, do not experience the deterrent that is intended in an award of damages.

In addition to these liability issues, there are also procedural issues that negatively impact access to justice. For example, due to the fact that municipalities hold joint and several liability for torts committed by municipal officers and employees of police boards, the limitations for providing notice to municipalities of such torts are governed under section 736 of the *Local Government Act*, RSBC 2015, c 1, part 18 (the "LGA").¹ The LGA requires that notice be given in writing, setting out the time, place and manner in which the damage has been sustained **within two months** from the date on which the damage was sustained.

¹ Also reflected in the *Vancouver Charter*, SBC 1953, c55, Part VIII, s 294(2).

This timeline is inappropriate because the purpose of the two-month notice of damage is to inform a municipality, who would otherwise likely be unaware of the event, in order to allow a municipality to gather evidence in a timely manner. For example, if someone trips on a broken sidewalk, a municipality will be unaware of the harm and requires notice in order to assess the condition of the sidewalk, interview relevant witnesses, and create appropriate records. This is manifestly different than police forces. Police forces create records, gather evidence, and conduct interviews in the ordinary course of their activities and it is unreasonable to say that the police force is not aware of the actions of its members.

As compared to the two-year limitation to file litigation under the *Limitation Act*, SBC 2012, c 13, the requirement to provide notice of damage within two months is an unreasonable unjustifiable barrier in accessing justice. This is particularly so in relation to people experiencing poverty, whose lives are impacted by homelessness, addiction, and/or trauma.

Recommendations

Pivot recommends that BC take the following immediate actions:

1. Reform the *Police Act* so that the relevant municipal police board is the properly named party, and is jointly and severally liable for both torts and *Charter* violations committed by officers and employees of the board. While it may be fair for municipalities to be involved in litigation to the extent of ensuring the payment of awards, police forces should not be sheltered from the deterrent effect of an award of damages.¹
2. Amend the *Police Act* to include specific reference to breaches of the *Canadian Charter of Rights and Freedoms* by police officers and employees of police boards indicating what legal entity or entities will be held jointly and severally liable for said breaches.
3. Ensure that, regardless of what entity is the appropriately named party in litigation (whether it be the municipality or the police board), the *Police Act* explicitly requires that documents within the possession or control of the police department be disclosed in the ordinary course of document disclosure.
4. Ensure that, regardless of the ultimate liability scheme, the limitations periods for damage caused by police are in line with general limitations set under the *Limitation Act*.

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