Order P07-01

FINNING CANADA

David Loukidelis, Information and Privacy Commissioner
October 24, 2007

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Summary: Decision P07-01 declined to complete the inquiry or make an order because the complaint about Finning's collection of driver's licence record abstracts from existing and prospective employees did not concern any information about the complainant. On reconsideration, the complaint is dismissed under s. 52(1) because no personal information of the complainant was involved and the complaint and evidence does not, in any case, establish or raise reasonable grounds to believe that Finning was not complying with PIPA.

Statutes Considered: B.C.: *Personal Information Protection Act*, ss. 1, 2, 13(1) and (2)(b), 16(1) and (b), 19(1) and 2(b), 36, 38(4), 45 to 50 and 52; *Interpretation Act, s.* 29. **Canada:** *Interpretation Act*, s. 11.

Authorities Considered: B.C.: Decision P07-01, [2007] B.C.I.P.C.D. No. 11.

Cases Considered: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; *Clare v. British Columbia (Royal Canadian Mounted Police)*, [1993] B.C.J. No. 617 (C.A.); *Cambie Hotel (Nanaimo) Ltd. (c.o.b. Cambie Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2006] B.C.J. No. 501 (C.A.); *T.A. Miller Ltd. v. Minister of Housing & Local Government*, [1968] 1 W.L.R. 992 (C.A.); *Montreal Street Railway Co. v. Normandin,* [1917] A.C. 170 (P.C.); *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)*, [1992] F.C.J. No. 950 (C.A.); *R. v. Narain*, [1983] B.C.J. No. 895 (S.C.); *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, [2007] A.J. No. 896 (Q.B.).

1.0 INTRODUCTION

[1] This inquiry concerns a complaint to the Office of the Information and Privacy Commissioner ("OIPC") by an employee of an organization, Finning Canada ("Finning"), about its collection of driver's licence record abstracts ("driver abstracts") from employees and prospective employees.

[2] Finning objected to the sufficiency of the complainant's interest in the complaint because it did not involve his own personal information. The complainant made submissions in response. Noting the complainant's lack of individual interest in the matter, on June 4, 2007 I issued Decision P07-01,[1] in which I declined to complete the inquiry or make an order because there was no live dispute between the complainant and Finning as regards the complainant's own personal information. The complainant filed an application for judicial review of Decision P07-01,[2] in which he contended that ss. 50 and 52 of PIPA required completion of the inquiry and the issuance of an appropriate order.

[3] In *Chandler v. Alberta Association of Architects*,[3] the Supreme Court of Canada held that, as a general rule, once an administrative tribunal has reached a final decision in respect of a matter before it in accordance with its enabling statute, the decision cannot be revisited because the tribunal has changed its mind or made an error within jurisdiction or because there has been a change in circumstances. The tribunal can only reconsider if it is authorized by statute, there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal.

[4] To this extent, the principle of *functus officio* does apply to administrative tribunals. Its application, however, must be more flexible and less formalistic for administrative tribunals that are subject to appeal only on a point of law as opposed to courts whose decisions are subject to a full appeal. The Court held that the tribunal in *Chandler* had intended to make a final disposition but had acted on an erroneous understanding of its powers, which caused it to fail to consider making recommendations as it was required to do. The result in law was no disposition at all by the tribunal, which could resume its proceedings to consider disposition of the matter on a proper basis.

[5] The *Chandler* decision has been considered in many later cases. These include *Clare v. British Columbia (Royal Canadian Mounted Police)*,[4] which involved an application for judicial review of a decision refusing to issue

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[1] [2007] B.C.I.P.C.D. No. 11.
[2] *David Sochowski v. Office of the Information and Privacy Commissioner for British Columbia*, BCSC Docket No. S075271, Vancouver Registry. At the time of writing, the petition has not been heard.
[3] [1989] 2 S.C.R. 848.
[4] [1993] B.C.J. No. 617 (C.A.).

a permit to carry a handgun. When served with the application for judicial review, the decision-maker recognized that he had erred by rigidly applying administrative policy and resolved to reconsider his decision having regard to the proper principles. The British Columbia Court of Appeal held that the principle of reconsideration applied and overturned the conclusion of the trial court that the reconsideration had been a sham.

2.0 ISSUE

[6] I have concluded that my declining to complete the inquiry or make an order in Decision P07-01 was not a proper disposition of the matter and that the principle of reconsideration permits me to reconsider and complete the disposition having regard to ss. 50 and 52 of PIPA.

3.0 DISCUSSION

[7] **3.1 PIPA Provisions Regarding Inquiry & Disposition—** Section 50(1) of PIPA reads as follows:

> (1) If a matter is not referred to a mediator or is not settled under section 49, the commissioner may conduct an inquiry and decide all questions fact and law arising in the course of the inquiry.

[8] The word "may" has meaning with reference to the commissioner's authority to "conduct" and to "decide". The word "all" authorizes the commissioner to decide any question of fact or law that arises in the course of an inquiry without requiring him or her to decide every factual and legal question that arises.

[9] Not all or even part of a matter that is either not referred to or is not settled in mediation under s. 49 will warrant an inquiry. Factual and legal issues may arise in an inquiry that, depending on the commissioner's view of the evidence and the law, need not be addressed or resolved. An obvious example of the latter case is where alternative submissions are made and a decision on any one of them disposes of the matter. The result is that the commissioner exercises discretion under s. 50(1) about whether to conduct an inquiry and about what questions of fact and law need to be decided to dispose of the issues at stake in the inquiry.

[10] Section 52(1) of PIPA reads as follows:

> (1) On completing an inquiry, the commissioner must dispose of the issues by making an order under this section.

[11] Section 52(2) applies to an inquiry into an organization's decision to give or to refuse access to all or part of an individual's personal information, which is not the case here. Section 52(3) is, however, relevant. It reads as follows:

> (3) If the inquiry is into a matter not described in subsection (2), the commissioner may, by order, do one or more of the following:
>
> (a) confirm that a duty imposed by this Act or the regulations has been performed or require that a duty imposed by this Act or the regulations be performed;
>
> (b) confirm or reduce the extension of a time limit under section 31;
>
> (c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances;
>
> (d) confirm a decision not to correct personal information or specify how personal information is to be corrected;
>
> (e) require an organization to stop collecting, using or disclosing personal information in contravention of this Act, or confirm a decision or an organization to collect, use or disclose personal information;
>
> (f) require an organization to destroy personal information collected in contravention of this Act.

[12] Section 52(1) requires the commissioner to dispose of the issues by order under that section, yet s. 52(3) gives discretion about the issuance of an order. These provisions must be interpreted in a manner that is harmonious with all of s. 52 and in relation to the commissioner's authority under s. 50 to decide all questions of fact and law in an inquiry. The effect, in my view, is as follows:

- An order must be made under s. 52 that disposes of the issues in the inquiry.
- The order need not decide every fact or every issue, only those that, on the commissioner's view of the evidence and the law, are required to be decided to dispose of the case.
- The order may do one or more of the things listed in s. 52(3).
- When the kinds of order listed in s. 52(3) are not apposite—examples might be when the subject matter no longer exists, the complaint involved is found to be an abuse of process or the parties reached a settlement after the inquiry was underway—this can be reflected in the order that disposes of the issues.

[13] PIPA's goal is for the OIPC to resolve complaints and reviews by means of investigation, mediation, inquiries and orders. To achieve expeditious, efficient and fair administration of those processes, it would be unnecessary and often counterproductive to turn over and decide every factual and legal rock for every case, or even for every matter that reaches a formal inquiry. I have interpreted

ss. 52(1) and (3) in order to respect and give life to the statutory wording in a manner that reflects reality, which I believe the Legislature intended, and that does not foster obfuscation by technicality, which was clearly not its objective.

[14] In Decision P07-01, I said that I was declining to complete the inquiry or make an order. Having concluded that, in doing this, I had not in fact completed disposition of the matter under s. 52, I told the parties that I was going to reconsider. Before doing so, I gave them an opportunity to make further representations. The complainant's brief submission reiterated points already made; Finning made no further submission.

[15] **3.2 Background to the Complaint**—The Insurance Corporation of British Columbia ("ICBC") maintains driver abstracts,[5] which contain the following information:

- Driver's name and address
- Driver's height, weight, eye colour and gender
- Type of licence held by the driver
- Originating date of the licence
- Expiry date of the licence
- Status of the licence, including any restrictions imposed
- Definitions of any restrictions imposed
- Any violations incurred by the driver in the previous 5 years.

[16] An individual can ask ICBC for her or his own driver abstract and may disclose it, or consent to its disclosure, to a third party such as an insurer or employer.

[17] In late 2003, Finning introduced a policy requiring most of its employees to provide it with their driver abstract and insurance claim history annually. Around the time PIPA came into force, on January 1, 2004, Finning revised its policy to no longer require insurance claim history information and to limit the application of the policy to "directly affected employees", which were defined as:[6]

> (a) All hourly and salaried employees who are required, as part of the job or on occasion due to business demands, to operate any vehicles or

[5] See *Motor Vehicle Act*, RSBC 1996, c. 318, s. 82(10), and *Motor Vehicle Act ICBC Records Regulation*, BC Reg 1/97, s. 2(a)(iv). These provisions make ICBC responsible for and the owner of "every record, of the type commonly known as a 'driver's record' or 'driving record', that sets out or describes the driving history of a person".

[6] Para. 8, Complainant's initial submission.

> heavy machinery (including motorized equipment such as forklifts, wheel loaders, excavators, etc.), to maintain a valid driver's license.
>
> (b) Employees who operate Finning (Canada) marked and unmarked vehicles either as a regular part of their job (field mechanics) or from time to time (e.g. delivering parts, errands, etc.).
>
> (c) All hourly and salaried employees who are required to move customer vehicles.
>
> (d) All salaried employees who receive a vehicle allowance.

[18] The complainant, a heavy-duty mechanic and long-time Finning employee, did not provide his driver abstract and in March 2004 he complained to the OIPC about Finning's policy of collecting employee driver abstracts. He also complained again later and he filed two applications for judicial review in connection with his complaints to the OIPC. It is fair to say that the complainant has not been satisfied with Finning's policy or the OIPC's responsiveness to his concerns about the policy.

[19] In his initial complaint to the OIPC, the complainant maintained that PIPA did not permit Finning to require him to produce a driver abstract as a condition of his employment and that production of a valid British Columbia driver's licence was sufficient. The complaint was suspended pending resolution of union grievances in British Columbia and Alberta about Finning's policy. The complainant's union and Finning resolved their differences in British Columbia, but not to the complainant's satisfaction. In Alberta, an arbitrator found that a Finning policy requiring every employee to produce a driver abstract was unreasonable under the collective agreement.[7] The complainant asked to resurrect his complaint to the OIPC. This quote comes from a December 10, 2004 letter from his lawyer:

> Until now, [the complainant's union] has refused to advance [the complainant's] complaint of a breach of his privacy rights as a grievance under the *Labour Relations Code*. We therefore respectfully request that the commissioner consider and apply Arbitrator Smith's award to [the complainant's] complaint under the *Personal Information Protection Act*.
>
> Further, as Arbitrator Smith's award considers the justification for the Employer's policy requiring production of a driver's license abstract and rejects them [*sic*] in light of the privacy rights in issue, we respectfully suggest that there is little utility in mediating this complaint and that [the complainant's] complaint should proceed directly to an enquiry under Section 50(1) of PIPA.

[7] *International Association of Machinists and Aerospace Workers Local Lodge 99 – and – Finning International Incorporated* (December 6, 2004) (Arbitrator P.A. Smith).

[20] On March 15, 2005, the complainant told the OIPC that Finning's policy had been revised again and provided the latest version of the policy, along with copies of Finning job postings that sought driver abstracts from prospective employees.

[21] On March 16, 2005, the OIPC portfolio officer assigned to the matter reported to the complainant that he considered the complaint resolved on the following basis:

> My apologies for not responding to your earlier correspondence concerning mediation of the complaint; this matter has been dealt with as a complaint investigation rather than a mediation of a dispute.
>
> Shortly after receiving your letter of complaint, I was in contact with Ray Mazurak, Human Resources Manager for Finning. Mr. Mazurak confirmed that the matter at issue had been grieved against the employer's operations in Alberta, that the grievance had been heard and that an award was expected before the end of the year. He indicated that the unions representing Finning employees had agreed to accept the arbitrator's award across Canada and that your client had not been required to produce either a driver's abstract or to sign a release for the employer to obtain an abstract.
>
> In mid-December, Mr. Mazurak confirmed that the arbitration award had been handed down, that Finning was working out the details of the implementation of the arbitration award with the Alberta union and that meetings with the unions representing BC employees were scheduled for the following week.
>
> In mid-February, Mr. Mazurak confirmed that the new driver abstract policy had been issued and that the BC unions had approved the policy. He indicated that, under the new policy, mechanics who go out in the field only on an occasional basis would only have to show a valid driver's license. Mechanics who have more frequent field travel would be required to provide a driver's abstract. Mr. Mazurak provided a copy of the new policy to this office.
>
> It was not clear from our review of the policy that mechanics such as your client would not be required to produce a driver's abstract. Mr. Mazurak indicated that Finning and the union were prepared to accommodate your client on a "one off" basis if necessary. He confirmed that the policy was intended to cover occasional use but to make an exception for unusual or exceptional use. He was willing to consider an amendment to the policy to provide a lesser standard for those in your client's circumstance.
>
> After further consultation with this office, Finning amended its policy to include the following clauses:
>
> - Employees who are not "directly affected" employees, are not required to provide driver's abstract or approval. They will be required

> to produce a valid driver's license on every occasion before operating a licensed motor vehicle for the purpose of the employer's business.
>
> **Directly affected employees include:**
>
> - All hourly and salaried employees who are required, as part of their job or on occasion due to business demands (more than 10 times per year) to operate any licensed motor vehicle.
>
> - Employees who operate Finning (Canada) marked and un-marked vehicles either as a regular part of their job (e.g. field mechanics) or from time to time (e.g. delivering parts, errands, etc. more than 10 times per year).
>
> You appended the most recent policy to your letter of March 15, 2005.
>
> It is our understanding that your client does not normally operate a licensed vehicle for the purpose of the employer's business. If that is the case, under the new policy he will not be required to produce a driver's abstract. On the rare occasions that he is required to operate a licensed vehicle, he will be required to produce a valid driver's license.
>
> As this is the result your client was seeking when you complained to this office on his behalf, we consider the complaint to be resolved and are closing our investigation file. I am notifying Finning of the results of this investigation by copy of this letter.
>
> Your concerns about new employees being required to produce a driver's abstract are another matter. If any of those employees share your concern, they should first attempt to resolve their concerns with their employer or trade union. If their concerns about the use of their personal information remain unresolved, they may then complain to this office.

[22] The complainant wrote to his union, and apparently Finning as well, to follow up on his concerns about Finning's continued retention of driver abstracts collected from members of the bargaining unit before the new revision of its policy.

[23] In July 2005, he asked the OIPC to revive his complaint on the basis that new job postings did not comply with PIPA or even Finning's revised policy, and that Finning had not responded to his concerns about continued retention of previously collected employee driver abstracts. He enclosed copies of 38 job postings, 31 of which required production of a driver abstract. His lawyer's July 28, 2005 letter to the portfolio officer who had handled his initial complaint said this:

> In your letter of March 15th, the commissioner took the position that [the complainant's] complaint had been resolved, and if any new or prospective

> employee was concerned about the policy's continued application to their circumstances, you would await a complaint from them before proceeding to further steps.
>
> Notwithstanding this advice, as a result of the Employer's apparent flouting of the resolution to [the complainant's] previous complaint, whether or not this issue arises again in [the complainant's] individual case, he wishes to obtain a final, binding resolution of this matter from your office from a public interest standpoint. Any fellow employee or prospective employee who is required to produce personal information in an unreasonable manner represents a potential threat to privacy rights in general. The more [the complainant's] concerns about privacy are marginalized and his position appears not to be endorsed by others (who may share his concerns, but not his strength of conviction to register a formal complaint and uphold their privacy rights, as a result of fear of reprisal or loss of employment opportunities) the more the Employer may continue to feel justified to ignore the spirit of this informal resolution and maintain its demands for intrusion into the realm of personal information, beyond what is reasonably required for management of the employment relationship.
>
> In conclusion, we respectfully request that [the complainant's] complaint be revived, and a formal resolution process undertaken to secure protection of privacy rights for [the complainant] and all other employees or prospective employees of the Employer….

[24] The OIPC then opened a new case file that was assigned to the same portfolio officer. The complainant, through an August 28, 2005 letter from his lawyer, expressed dissatisfaction with the portfolio officer's earlier efforts:

> [The complainant's] previous complaint was mediated with Finning (Canada) without his involvement. Indeed, he was not advised the matter had proceeded to mediation until after a resolution was reached. This time, [the complainant] would appreciate being informed if his case is referred to mediation. However, as stated in his complaint of July 28, 2005, given Finning (Canada's) failure to abide by the last mediated resolution, [the complainant] respectfully submits that this matter is more appropriately addressed by way of hearing.

[25] Letters to the portfolio officer from September 2005 to February 2006 received no reply. On April 7, 2006, soon after the complainant filed an application for judicial review to compel action on his complaint, the portfolio officer forwarded an October 18, 2005 letter from Finning to the effect that it had advised employees that they could request return of their previously submitted driver abstracts and Finning had also undertaken a review of what positions called for production of a driver abstract. Finning reported that approximately 60% of its 985 job postings to date in 2005 had required production of a driver abstract and said it was in full compliance with its driver abstract policy.

[26] The complainant was not at all content with this or generally with the portfolio officer's efforts on his complaint. He objected to what he characterized as *ex parte* communications between the portfolio officer and Finning. He objected that the complaint had taken too long to deal with and, in his eyes, had not yielded worthwhile results. He said that his input ought to have been solicited respecting information Finning provided. He asked that an inquiry be held immediately. In an April 9, 2006 letter, his lawyer said this:

> As we read PIPA, the commissioner is required to either conduct an inquiry into a complaint, or refer the matter to mediation. Presumably, although this is not stated clearly in the legislation, a complaint could be dismissed if it fails to disclose a *prima facie* breach of the statute. Clearly, this complaint discloses a *prima facie* breach. We can therefore find no provision for anything you have done in purporting to address the complaint. Indeed, while we are not yet taking this position, we are considering whether soliciting submissions and having *ex parte* communications with [Finning] raises a reasonable apprehension of bias on the part of the commissioner.[8] We are further troubled because this is the second time that the commissioner has handled [the complainant's] complaint with such disregard to procedural fairness.

[27] On April 28, 2006, the OIPC issued a notice of written inquiry and a brief portfolio officer's fact report. The fact report said the complaint was that Finning had not, in 38 job postings provided by the complainant, conformed to its policy on the collection of employee driver abstracts or to PIPA. The issues in the inquiry were identified as whether:

1. The information Finning collected under its driver abstract policy was "employee personal information" as defined under PIPA;

2. Finning was entitled under ss. 13 and 16 of PIPA to apply its driver abstract policy to collect and use the information in employee driver abstracts without consent of the affected employees; and

3. Finning was requiring, through recent job postings, the production of employee driver abstracts in circumstances inconsistent with its own driver abstract policy and whether the collection and use was contrary to ss. 6(1), 13 or 16 of PIPA.

[28] The parties made written submissions on those issues as well as Finning's objection to the sufficiency of the complainant's interest in the matter because none of his personal information was involved in the complaint.

[8] Reference to the "Commissioner" was of course a reference to the OIPC.

[29] **3.3 Finning's Policy**—The March 2005 revision of Finning's policy on collecting employee and prospective employee driver abstracts, which was current at the time of the inquiry, reads as follows:[9]

> Purpose:
>
> - Finning (Canada) has a corporate and legal responsibility to ensure that, as a result of its day-to-day business operations, the health and safety of its employees, customers and the public is protected.
> - Finning (Canada) is prohibited by law (through insurance statutory conditions) from allowing an individual who is not legally authorized and licensed within the law to operate an automobile.
> - Criminal Code convictions or certain driving restrictions (identified on the abstract) may prohibit an employee from driving any motorized vehicle, including forklifts, wheel loaders, excavators, etc.
> - Inability to provide drivers' abstracts to our insurance underwriters contributed to a refusal to renew our insurance coverage and significantly increased premiums through a new carrier.
> - Finning's insurance coverage would be, in part, void in the event that an employee, who does not have a valid driver's license, is involved in an on-the-job vehicle accident.
>
> Driver's abstracts are required for "directly affected" employees operating motor vehicles:
>
> - In keeping with Finning's Health and Safety policy, and as a condition of employment, directly affected employees (see definition below) who may operate, either as part of their job or on occasion due to business demands, any licensed vehicle are required to be legally authorized and licensed within the law. Those employees are also required to promptly advise Finning if their driving privileges are suspended or if they are otherwise prohibited, by law, from driving.
> - Each year, directly affected employees are required to provide to Finning (Canada) a driver's license abstract or to sign a waiver giving Finning (Canada) approval to obtain a driver's abstract. This will give the company a record of any violations, restricted licenses, suspended licenses, convictions (criminal) or driving restrictions.
> - Directly affected employees are asked to send their abstract or completed waiver to Finning Human Resources. This information will be maintained in strict confidence.
> - Management will review licenses that have restrictions, violations or convictions to determine appropriate next steps (e.g. permitting an

[9] Exhibit "A", Mazurak affidavit to the Organization's initial submission.

employee to operate motor vehicles, providing supplemental driver's education courses to help improve employees' driving skills, etc.)

- Employees who are not "directly affected" employees, are not required to provide a driver's abstract or approval. They will be required to produce a valid driver's license on every occasion before operating a licensed motor vehicle for the purpose of the employers business.

Directly affected employees include:

- All hourly and salaried employees who are required, as part of their job or on occasion due to business demands (more than 10 times a year) to operate any licensed motor vehicle).
- Employees who operate Finning (Canada) marked and un-marked vehicles either as a regular part of their job (e.g. field mechanics) or from time to time (e.g. delivering parts, errands, etc. more than 10 times per year).
- All hourly and salaried employees who are required to move customer vehicles.
- All salaried employees who receive a vehicle allowance.
- Candidates for employment.

Employees not directly affected include:

- Employees who operate a licensed vehicle for the purposes of the employer's business fewer than 10 times per year or only in unusual or exceptional circumstances.

Consequences for failing to provide approval to obtain driver's abstract:

- Directly affected employees who fail to provide the signed waiver to obtain the driver's abstract may be restricted from operating any licensed vehicle. Management may attempt to accommodate them in an alternate job, until such time as the driver's abstract is obtained.
- If no reasonable alternative work accommodations are available, the employees may be suspended without pay until the driving record can be verified.

[30] **3.4 Parties' Submissions**—The complainant's submissions can be summarized as follows:

1. Driver abstracts are not "employee personal information" as defined in s. 1 of PIPA because they are not reasonably required by Finning to establish, manage or terminate the employment relationship.

2. The production of a driver's licence is sufficient to provide Finning with all information reasonably required for employment purposes around the operation of motor vehicles, of a certain class, without restriction, at the direction of Finning.

3. Any requirement by an insurance carrier for information in excess of a driver's licence will also breach Finning employees' privacy rights under PIPA.

4. Some information in the driver's licence (such as driver gender and date of issuance of the licence) is not reasonably required for purposes of establishing, maintaining or terminating the employment relationship. However, the collection of that information may be authorized under s. 8(1)(a) (deemed consent). The driving violation history for the previous five years is information in the driver abstract, but not in the driver's licence, and it remains outside of Finning's reach.

5. No other PIPA provision authorizes Finning to collect driver abstracts from employees or prospective employees.

6. In 40 further job postings, Finning required driver abstracts for virtually every position, which was not consistent with its policy.

7. In order to have fair access to evidence controlled by Finning, the complainant requires an opportunity to cross-examine Finning's insurer on its recommendation to collect driver abstracts and Finning officials about whether the posted positions actually warranted the production of driver abstracts.

8. The complainant had a direct and material interest in the Finning policy when he first complained to this office. He shares many of the characteristics of the Finning employees who are still required to produce their driver abstract and, but for his singular exemption from the policy, he would continue to have a direct and material interest in the policy. Finning cannot avoid scrutiny of its policy by making singular exemptions for those who file complaints.

9. The test for public interest standing requires that there be a serious issue to be tried. This is met because the OIPC's acceptance of the complaint for an inquiry under PIPA indicates that it raises at least a *prima facie* issue.

10. The complainant is an advocate of privacy rights and does not limit himself to his own specific situation. He argues that Finning's policy is itself a breach of PIPA and there is no other process available for him to have the matter dealt with.

11. Affidavits Finning submitted contain inadmissible hearsay and a report by Finning's insurer is inadmissible and self-serving opinion evidence.

[31] Finning's submissions can be summarized as follows:

1. The complainant lacked standing to make the complaint under PIPA because he did not apply for any of the posted positions involved and Finning exempted him from its policy regarding employee driver abstracts.

2. The purpose of PIPA, and its dispute resolution provision in s. 38(4), is to recognize the right of *individuals* to protect their personal information and the need for *organizations* to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances. The appropriate response to the complainant, as stated in the portfolio officer's March 15, 2005 letter to him, was for the OIPC to wait for a complaint from an affected individual.

3. It is not a useful exercise for the OIPC to attempt to formulate a blanket ruling regarding the application of the Finning driver abstract policy when each job posting, of which hundreds are posted each year, is fact specific.

4. The complainant has no individual interest in the complaint, nor does he meet any of the traditional criteria for public interest standing:

   (a) serious issue at stake;

   (b) genuine interest in the matter;

   (c) unavailability of another reasonable and effective way to bring the matter forward.

5. Driver abstracts are "employee personal information" under PIPA because it is reasonable, and recommended by Finning's insurer, to collect the five-year history of driving violations for employees whose duties involve operating a licensed vehicle 10 or more times in a year.

6. Driver abstracts are not available without the consent of the driver, which Finning has from all affected employees.

7. Finning submitted nine pages of reasons why it requested driver abstracts for job postings attached to the complaint and eight pages of reasons why it requested driver abstracts for the further job postings attached to the complainant's submissions to the inquiry. The decision to request an abstract for a position is made by the manager posting the position, who is aware of the Finning policy and inserts the requirement if, in the manager's opinion, there is a likely prospect of the employee being a "directly affected" employee under the policy.

8. The explanations Finning has provided should be a sufficient basis to conclude that it has applied the policy consistently and in good faith. Calling live witnesses from across British Columbia and Alberta to enable the complainant to cross-examine them would be contrary to the purposes of PIPA and the law of standing. Furthermore, the OIPC has no authority over the Alberta job postings.

9. In response to the complainant's evidentiary objections, Finning maintains that the hearsay rules for judicial proceedings do not apply in administrative proceedings. The evidence the complainant objects to is reliable, admissible and supported by other evidence as well.

[32] **3.5 Discussion**—To recap, in Decision P07-01, I declined to complete the inquiry or make an order because the complaint did not involve information about the complainant. He objected to this on the ground that ss. 50 and 52 of PIPA required completion of the inquiry and the issuance of an appropriate order. I have decided to reconsider and make a proper disposition.

[33] I have outlined the submissions of the parties and will now, on the basis of my analysis of the evidence and the law, make an order that disposes of the necessary issues to conclude this matter. Because the complaint does not concern a decision of an organization to give or refuse to give access to an individual's personal information, an order under s. 52(2) would not be in prospect, but an order under s. 52(3) could be.

[34] Both the driver's licence and the driver abstract contain personal identifiers of the driver and information about the type and conditions of the licence held. The driver abstract alone also contains the previous five-year history of driving violations.

[35] The complaint has two fronts:

1. The complainant maintains that a blanket policy requiring all employees or prospective employees to produce driver abstracts is contrary to PIPA because, in essence, the driver's licence contains all the personal information that is reasonably required to establish, manage or terminate an employment relationship and the added information in the driver abstract—the previous five-year history of driving violations—is not reasonably required for employment purposes.

2. The complainant also maintains that, rather than following a policy of limiting the requirement of driver abstracts to positions that are likely to require the operation of a licensed motor vehicle more than 10 times a year, Finning has indiscriminately required driver abstracts for virtually all job postings.

Sufficiency of the complainant's interest

[36] The complainant tendered job postings, some for positions outside British Columbia. Finning, through the affidavit of its BC-Yukon Human Resources Manager, submitted explanations for why each of the positions fell within its policy for requiring a driver abstract. The complainant tendered more job postings, some also for positions outside British Columbia. Finning submitted more explanations.

[37] The complainant did not apply for any of the job postings in question.

[38] Finning has not required the complainant to provide his driver abstract. He characterizes this exclusion as being aimed at blocking scrutiny of its policy. The material before me shows that the policy is intended to cover regular or occasional (more than 10 times a year) employee operation of a licensed motor vehicle on Finning business and that Finning has agreed the complainant's on-the-job operation of a licensed motor vehicle is infrequent enough that he does not fall under the policy. I do not share the complainant's view that his exclusion from the policy is untoward or nefarious in intention or effect.

[39] Some candid observations are in order about the provisions in Part 11 and other parts of PIPA that govern the OIPC's processes. These are to put it mildly not a model of simplicity or clarity. The definitions, intertwining terminology and tortured linking of provisions in Parts 10 and 11, which are reproduced in the appendix to this order, are particularly challenging to interpret.

[40] Section 45 defines "complaint" in Part 11 to mean a complaint referred to in s. 36(2), which is the commissioner's authority to, without limitation of the powers under s. 36(1), investigate and attempt to resolve a wide variety of complaints. Section 36(1)(a) gives the commissioner authority to initiate investigations and audits to ensure compliance with any provision of PIPA, whether a complaint is received or not, but only if satisfied there are reasonable grounds to believe that an organization is not complying with the legislation. Section 36(2), in contrast, does not incorporate a requirement for reasonable grounds to believe that an organization is non-compliant. Section 36(2) also does not specify who may make a complaint.

[41] Sections 45, 46 and 47 distinguish between conducting a review and making or resolving a complaint. The conduct of a review is tied to a request by an individual for access to or correction of her or his own personal information. Under s. 47(2), any request for a review that does not involve an organization's failure to respond within a required time period must be made within 30 days of notice of the circumstances upon which the review is based, or a longer period allowed by the commissioner. Making or resolving a complaint is tied to an

individual and to the meaning of complaint in s. 36(2). Under s. 47(3)(b), a request to resolve a complaint need not be made within any prescribed time.

[42] The complaint jurisdiction under s. 36(2), particularly ss. 36(2)(a) and (d), is wide enough to encompass review of a decision resulting from an individual's request for access to or correction of his other personal information. Therefore, on the face of it, a concern of that type could be brought as a complaint or as a review. Against any apparent logic, there would be no prescribed time limit to bring the matter as a complaint but there would be a prescribed 30-day time limit to bring the same matter as a review. It is true that, under s. 47(2)(b), the commissioner could relax the time period for a request for review to be delivered, but if the commissioner refused to do this, the matter could still be brought anyway as a complaint.

[43] The wording of s. 36(1)(b) introduces more needless complexity and uncertainty because it empowers the commissioner to "make an order described under section 52(3), whether or not a review is requested" but not, evidently, whether or not a complaint has been made. This means that, for a case about an organization's decision, act or failure to act respecting access to or the correction of an individual's personal information, the commissioner may make an order under s. 52(3) even if a review is not requested, but not under s. 52(2) even though the relief in s. 52(2) could well be relevant in such a case. Further, if the commissioner were to investigate that same matter, or any other matter, without having received a complaint about it, then he or she could make no order under s. 52 at all. As if this were not enough, the s. 45 definition of the meaning of "review" in Part 11 clearly invites the question of whether "review" could have a different meaning in s. 36(1)(b), found in Part 10 of PIPA.

[44] Worse still, s. 45 creates a definition of "request" in Part 11 that, in relation to complaints, means a request made in writing under s. 46 to resolve a complaint. Section 46(2) refers to making a complaint. Section 47(1) refers to making a complaint by delivering a request and s. 48(2) refers to receiving a request respecting a complaint. The lamentable upshot of these various definitions and inconsistent terminology is that unreal distinctions are created between making a complaint and requesting it to be resolved.

[45] There are also different prescribed time frames for the completion of complaints as contrasted with reviews under Part 11. Under s. 50(6) and (7), if a complaint is referred to inquiry, the time frame for completion of the inquiry is 30 days after the end of mediation or, if there is no mediation, after the delivery of the request. Under s. 50(8), if a review is referred to inquiry, the timeframe for completion of the inquiry is 90 days from delivery of the request or longer as specified by the commissioner.

[46] In this case, assuming for the purpose of discussion that s. 46(2) permitted the complainant to bring a complaint about the collection of personal information other than his own, s. 50(6) would appear to have required the inquiry to have been completed no later than 30 days after the issuance of the notice of inquiry on April 28, 2006 (the latest possible date for the end of mediation). However, the last submission on the written inquiry was not until June 26, 2006, which, even excluding holidays, exceeded the 30-day time limit.

[47] Section 52(1), as already noted, requires that "[o]n completing an inquiry under section 50, the commissioner must dispose of the issues by making an order under this section". The OIPC interprets completion of the inquiry and the time requirement associated with that as being the close of evidence and submissions and not as the issuance of an order under s. 50. This is because it is a reasonable interpretation of the words "[o]n completing an inquiry" and one that is the only practicably feasible interpretation in terms of the administration of the inquiry process.

[48] The last point is specifically relevant to the issue of the sufficiency of the complainant's interest in this complaint. If the complaint jurisdiction in s. 36(2) does not itself permit the complaint to be made and the exclusive avenue for doing so is s. 46(2) ("an individual may make a complaint to the commissioner"), then it would appear that only an individual may bring a complaint. However, in contrast to a review under s. 46(1), which must relate to access or correction of the personal information of the individual who requested the review, s. 46(2) lacks explicit wording requiring a complaint to be about the individual complainant's own personal information.

[49] As commissioner, it is my responsibility to interpret all of these provisions and the legislative intention behind them, however challenging that task might be.

[50] Referring to s. 2, I agree with Finning that the purpose of PIPA is to recognize the privacy rights of individuals in relation to the needs of organizations to collect, use and disclose personal information. We are dealing here with an inquiry into a complaint and, despite the cryptic wording of s. 46(2), in my opinion neither s. 36(2) nor the inquiry provisions in Part 11 are intended to permit an individual to make a complaint to the commissioner about an organization's collection, use or disclosure of personal information relating to another individual. The focus on individual rights in PIPA is on the privacy rights of an individual in relation to that individual's own personal information, not the personal information of others. The wording of s. 38(4) provides additional support for my conclusion that a complaint must be made by an individual in relation to his or her own privacy interest:

> (4) The commissioner may require an individual to attempt to resolve the individual's dispute with an organization in the way directed by the commissioner before the commissioner begins or continues

> a review or investigation under this Act of an applicant's complaint against the organization.

[51] The complainant wishes to make a complaint in the public interest. In my view, that role under PIPA falls to the commissioner and not to a complainant. Section 36(1)(a) empowers the commissioner to initiate an investigation whether or not a complaint is received, so the commissioner can investigate a case that no individual does or can bring forward. For such cases, the Legislature, in its wisdom, has imposed a threshold that is not present for complaints by individuals, which requires the commissioner to be satisfied that there are reasonable grounds to believe an organization is not complying with PIPA.

[52] This threshold is reminiscent of the minimum grounds for authorizing a search or seizure in connection with a criminal or quasi-criminal matter—reasonable and probable grounds to believe that an offence has been committed and there is evidence to be found at the place of search—but it applies to any level of investigation or audit by the commissioner. The standard of "reasonable and probable grounds" is arguably higher than "reasonable grounds" in s. 36(1)(a) of PIPA. Still, in my view the precondition for reasonable grounds to believe an organization is not in compliance restrains the commissioner from being able to conduct random investigations or audits of organizations. It also prevents him or her from undertaking investigations or audits on the basis of as yet unsubstantiated suspicions of non-compliance with PIPA. Police are certainly able and expected to investigate suspicions of criminal or quasi-criminal conduct in order to gather information that may then support issuance of a search warrant on reasonable and probable, or other statutorily prescribed, grounds. Regulatory authorities such as the OIPC are ordinarily able and expected to investigate as yet unsubstantiated suspicions of non-compliance, but because of the wording of s. 36(1)(a) of PIPA, the commissioner may not even begin a self-initiated investigation without first having reasonable grounds to believe that an organization is not complying with the legislation.

[53] There is also a distinction between a complainant who makes a complaint without there being any directly interested person who is capable of bringing or likely to bring the matter forward in his or her own right and a complainant who makes a complaint about a matter that affects others. The complainant in this case falls into the latter category. Finning is a large company with many employees and its driver abstract policy and practices are matters about which directly affected individuals have the ability to complain and can be expected to complain on their own behalf.

[54] Having concluded the complainant lacks the necessary individual interest in the complaint, I dismiss it on that basis and no other issues need to be decided in this inquiry. For the sake of completeness, however, I make further findings and observations below.

Earlier decision to conduct an inquiry

[55] I agree with the portfolio officer, in his March 16, 2005 letter, that the complainant's own complaint was resolved and, if a different Finning employee, or a prospective employee, had a concern about the policy's application, she or he had to make her or his own complaint. It is now clear that the present complaint, in which the complainant had no individual interest, did not qualify for an inquiry. The fact that it was set down for inquiry does not undermine the validity of the objection to the complainant's standing, which I have just upheld.

Finning's policy

[56] An individual's driving violation history is his or her personal information. The effect of the definition of "employee personal information" in s. 1 in combination with ss. 13(1), 13(2)(b), 16(1), 16(2)(b), 19(1) and 19(2)(b) of PIPA is that, if an individual's five-year driving violation history is reasonably required to establish, manage and terminate an employment relationship between Finning and the individual, then it may be collected, used or disclosed by Finning solely for that purpose.

[57] I do not agree with the complainant that personal information in the nature of driving violation history can almost never be reasonably required to establish, manage or terminate an employment relationship, and then only on a strictly individual-by-individual basis. For the purposes of s. 36(1)(a), I would not find that Finning's policy presented reasonable grounds to believe that it was not complying with PIPA.

Evidence about the job postings

[58] The complainant argued that Finning's explanations for requiring driver abstracts for the job postings he selected and submitted were inadequate and unconvincing, as well as inadmissible hearsay evidence. He acknowledged that he did not have evidence to counter Finning's explanations—this not surprising given that he was not an applicant for any of the positions—and said that, for this reason, he should be allowed to cross-examine Finning officials in order to fairly challenge Finning's hearsay justifications for requiring driver abstracts for each position.

[59] It is well established that hearsay evidence is admissible in administrative proceedings if it is relevant and can fairly be regarded as reliable[10] and that the

[10] *Cambie Hotel (Nanaimo) Ltd. (c.o.b. Cambie Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2006] B.C.J. No. 501 (C.A.).

weight to be given to evidence is a matter for the adjudicating body. As Lord Denning said in *T.A. Miller Ltd. v. Minister of Housing & Local Government*[11]:

> …Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that that must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it…

[60] This is undoubtedly true of an inquiry under PIPA, for which s. 50(1) authorizes the commissioner to decide all questions of fact and law arising and s. 50(4) authorizes the commissioner to decide:

> (a) whether representations are to be made verbally or in writing, and
>
> (b) whether a person is entitled to be present during, to have access to or to comment on representations made to the commissioner by another person.

[61] For this inquiry, the parties' submissions were received in writing, as is the dominant practice for the OIPC, and the parties had access to and the opportunity, which they acted on, to respond in writing to each other's submissions.

[62] The complainant's lack of evidence to counter Finning's explanations for requiring driver abstracts for the job postings he submitted was symptomatic of his lack of individual interest in the complaint, rather than procedural unfairness to him in the inquiry process.

Timing of the inquiry

[63] Section 50(6) of PIPA provides that, for a complaint that is referred to mediation but not settled there, the inquiry "must be completed within 30 days of the day on which the mediation ends". Section 50(7) provides that for a complaint that is not referred to mediation but for which the commissioner decides to hold an inquiry respecting the review, the inquiry "must be completed within 30 days of the day on which the request is delivered under section 47(1)". The prescribed period is expressed in relation to completion of the inquiry, not the making of an order, and s. 1 defines "day" to exclude holidays and Saturdays.

[64] In this case, the 30-day period was exceeded whether it is calculated under s. 50(6) or 50(7) and 11 months passed from the close of the parties' written inquiry submissions and the issuance of Decision P07-01.[12]

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[11] [1968] 1 W.L.R. 992 (C.A.), at 995.

[12] In annual reports, I have reported on service delivery challenges faced by the OIPC as a result of dramatic cuts to its budget in 2002. There has been some improvement in funding since 2004,

[65] Put in perspective, the initial complaint, which related to the complainant himself, moved along and was resolved (albeit, in the complainant's mind, without his being consulted). When he brought the complaint again "in the public interest", the OIPC's processes stalled. The complaint did not warrant inquiry because of the complainant's lack of individual interest in the matter, but it was sent there nonetheless, at which point the completion of the inquiry (marked by the close of the parties' submissions) exceeded the 30-day period in s. 50(6) or 50(7). Eleven months passed between receipt of submissions and Decision P07-01. The complainant's application for judicial review of Decision P07-01, which was filed on August 2, 2007, and the process for reconsideration and issuance of this order occupied approximately five months.

[66] The complainant is disgruntled with the pace and process for resolving his complaint made "in the public interest". I readily acknowledge that this matter should have been processed and dismissed much more quickly. The exceeding of the 30-day period in s. 50(6) or 50(7), and the other delays, did not result, however, in loss of jurisdiction to dispose of the matter by making the order under s. 52 that I am making here. I say this because, in my view, inquiry time periods in PIPA—and under the *Freedom of Information and Protection of Privacy Act*—are directory, in that they relate to the OIPC's performance of public duties, and to hold that these periods are mandatory would result in injustice for individuals who make complaints to and request reviews by the OIPC and who cannot control compliance with the statutory inquiry time periods.

[67] In this case, the complainant has not been successful and the complaint is being dismissed. If the statutory inquiry time periods were interpreted to be mandatory, I would lack jurisdiction to dispose of the issues by making an order under s. 52, whether by dismissing the complaint or by granting relief under s. 52(3) had I found that the complaint had merit. In arriving at this interpretation, I am relying on the principle expressed in *Montreal Street Railway Co. v. Normandin*[13] and its application in cases such as *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)*[14] and *R. v. Narain*.[15]

[68] In *Cyanamid Canada*, a third party, Cyanamid, was not notified of access to information requests within the statutory time limit for doing so. The federal *Access to Information Act* provided that the government institution "shall" give

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but the OIPC also acquired significant new responsibilities for oversight of PIPA compliance by the entire provincially-regulated private sector, both for-profit and not-for-profit, starting January 1, 2004. This has created significant new service demands, which are increasing. New responsibilities and service demands have also arisen because of my role as registrar of lobbyists under the *Lobbyists Registration Act*. The overall picture is that the cuts from earlier years continue to have an impact on OIPC operations to this day.

[13] [1917] A.C. 170 (P.C.).

[14] [1992] F.C.J. No. 950 (C.A.).

[15] [1983] B.C.J. No. 895 (S.C.).

written notice to affected third parties within 30 days of receiving the access request, or a longer period if the time for responding to the access request was extended under another provision. Like our *Interpretation Act*,[16] the federal *Interpretation Act*[17] provided that the expression "shall" is to be construed as imperative and the expression "may" as permissive. Cyanamid contended that the statutory time limit for giving third-party notice was mandatory, such that the institution's failure to meet the time limit had voided its decisions to release requested information. The Federal Court of Appeal rejected this contention:

> While there is a presumption that the word "shall" in a statute is mandatory in nature, there is no general rule to that effect and it has often been interpreted to be directory when certain conditions are present. The case most often cited in support of this proposition is *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.), where Sir Arthur Channell stated, at pages 174-175:
>
> > The question whether provisions are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at... When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. (Emphasis added)
>
> The doctrine in *Montreal Street Railway* has been relied upon in many cases including *Re Metropolitan Toronto Board of Commissioners et al.* (1973), 37 D.L.R. (3d) 487 (Ont. Div. Ct.); *City of Melville v. Attorney General of Canada* [1982], 2 F.C. 3 (F.C.T.D.); *Sandoz Ltd. v. Commissioner of Patents et al.* (1991), 42 F.T.R. 30 (F.C.T.D.). See also *Jasper Park Chamber of Commerce et al. v. Governor General et al.*, [1983] 2 F.C. 98 (F.C.A.) and *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1989] 2 F.C. 445 (F.C.A.). The Supreme Court of Canada cited *Montreal Street Railway* with approval in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, but did not apply it there because, as was pointed out at page 741, "the doctrine should not apply when the constitutionality of legislation is in issue".
>
> I am satisfied that the doctrine applies to the present case. The statutory notice provisions clearly involve the performance of public duties by the respondent. There is no sanction or penalty provided in the Act for a failure to give the notices in time. The object of the notice provisions is to provide

[16] RSBC 1996, c. 238, s. 29.
[17] RSC 1985, c. I-23, s. 11.

> a defined time frame within which a request for information should be processed, and to allow the requester to file a complaint with the Information commissioner. To interpret the notice provisions as mandatory, would result in a denial of the release of the information to the requesters and would only cause the filing of a second request and timely compliance. This would not promote the main object of these provisions. Furthermore the requesters, through no fault of their own, would be penalized by the error of the respondent notwithstanding that they do not object to their own late notices.

[69] In *R. v. Narain,*[18] legislation required a police board to issue a notice within 14 days after receiving a request for inquiry. The police board decided not to issue a notice and instead adjourned the matter pending the disposition of criminal charges against one of the police constables involved. McLachlin J. (as she then was) concluded that the statutory time requirement for the police board to issue the notice of inquiry was merely directory and non-compliance did not rob the police board of jurisdiction over the matter:

> 14 …The only question is whether this omission deprived the Board of its jurisdiction to hold an inquiry. If the provisions are mandatory, failure to comply with them is fatal to the Board's jurisdiction. If, however, they are merely directory, breach of the requirements does not deprive the Board of its powers.
>
> 15 It has frequently been said that no rule can be laid down for determining whether the requirement of a statute is to be considered a mere direction involving no invalidating consequence, or an imperative with implied nullification for disobedience, apart from the fundamental principle that it depends on the scope or object of the enactment: *The Liverpool Borough Bank v. Turner* (1861), 2 PEG. F.&J. 507; *Lacourse v. McLellan*, [1928] 3 W.W.R. 680 at 682 (Sask. C.A.). If the scope and object of an enactment is penal its requirements are construed as mandatory. On the other hand, in statutes imposing a public duty, prescriptions as to the manner and times in which it shall be performed are frequently construed as merely directory, especially where injustice would result if they were regarded as imperative: *Lacourse v. McLellan et al.*, *supra*, 682, 683. Thus it may be of assistance to consider whether the provisions of s. 40 of the *Police Act* governing an inquiry into a complaint against the police are penal or public in nature.
>
> …
>
> 19 I therefore conclude that the duties imposed by ss. 39 and 40 of the *Police Act* are essentially public. It follows that the Court may

[18] [1983] B.C.J. No. 895 (S.C.).

> interpret the provisions of these sections as to the manner in which that duty is to be discharged as regulatory if viewing them as mandatory would work injustice or cause inconvenience to others who have no control over those who exercise the duty: *Ans v. Paul*, *supra*, at p. 269. In the case at bar, interpretation of the provisions of s. 40 as mandatory would interfere with Mr. Narain's legitimate desire to have the public inquiry under the *Police Act* delayed until the criminal proceedings against him had been concluded. Such an interpretation could work an injustice against him. I cannot think that it was the intention of the Legislature to impose mandatory requirements which would frustrate the process of public complaint and inquiry which it was concerned to foster. The *Act* confers a right of public inquiry on a person aggrieved by the conduct of the police. To construe s. 40(5) as mandatory would mean that that right is lost if the Police Board makes even a small technical error. That, in my view, would be neither reasonable nor just. For these reasons, I conclude that the provisions as to service in s. 40(5) of the *Police Act* should be read as regulatory, not mandatory.
>
> 20 I am mindful of the fact that s. 40(5) provides that the Board "shall" perform the duties specified and that the *Interpretation Act*, s. 23, provides that "shall" shall be construed as imperative, subject to the context or other provisions of the statute calling for a different construction. In the case at bar, I am satisfied that the context, and most particularly the object of s. 40 of the *Police Act*, calls for construction of "shall" as regulatory rather than mandatory.

[70] In *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*,[19] Belzil J., of the Alberta Court of Queen's Bench, recently held that a time period that applies to the Alberta Information and Privacy Commissioner under Alberta's *Personal Information Protection Act* is mandatory, so that when the time period passed, the commissioner lost jurisdiction over the privacy complaint. The decision does not refer to *Cyanamid Canada* or *Narain*, and there are material differences between the relevant time provisions in the Alberta law and British Columbia's PIPA. I also respectfully disagree with the reasoning and result in *Kellogg Brown and Root* to the extent that Belzil J. considered and rejected the application of the *Normandin* principle to the type of time requirements in question there. In my view, the principle in *Normandin* is directly applicable to the type of statutory time requirements at hand and holding otherwise would work injustice or cause inconvenience to those who have no control over a commissioner's compliance, or ability to comply, with the time frames involved. This was not the intention of PIPA or the *Freedom of Information and Protection of Privacy Act*.

[19] 2007 ABQB 499, [2007] A.J. No. 896 (Q.B.).

4.0 CONCLUSION

[71] This inquiry is complete and, for the reasons given above, under s. 52(1) of PIPA, I order that the complainant's complaint against Finning is dismissed.

October 24, 2007

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OIPC File No. P05-26319

Part 10 -- Role of Commissioner

General powers of commissioner

36(1) In addition to the commissioner's powers and duties under Part 11 with respect to reviews, the commissioner is responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may do any of the following:

(a) whether a complaint is received or not, initiate investigations and audits to ensure compliance with any provision of this Act, if the commissioner is satisfied there are reasonable grounds to believe that an organization is not complying with this Act;

(b) make an order described in section 52 (3), whether or not a review is requested;

(c) inform the public about this Act;

(d) receive comments from the public about the administration of this Act;

(e) engage in or commission research into anything affecting the achievement of the purposes of this Act;

(f) comment on the implications for protection of personal information of programs proposed by organizations;

(g) comment on the implications of automated systems for the protection of personal information;

(h) comment on the implications for protection of personal information of the use or disclosure of personal information held by organizations for document linkage;

(i) authorize the collection of personal information by an organization from sources other than the individual to whom the personal information relates;

(j) bring to the attention of an organization any failure of the organization to meet the obligations established by this Act.

(k) exchange information with any person who, under legislation of another province or of Canada, has powers and duties similar to those of the commissioner;

(l) enter into information-sharing agreements for the purposes of paragraph (k) paragraph (k) and into other agreements with the persons referred to in that paragraph for the purpose of coordinating their activities and providing for mechanisms for handling complaints.

(2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that

(a) a duty imposed by this Act or the regulations has not been performed,

(b) an extension of time for responding to a request is not in accordance with section 29,

(c) a fee required by an organization under this Act is not reasonable,

(d) a correction of personal information requested under section 24 has been refused without justification, and

(e) personal information has been collected, used or disclosed by an organization in contravention of this Act.

Power to authorize organization to disregard requests

37 If asked by an organization, the commissioner may authorize the organization to disregard requests under section 23 or 24 that

(a) would unreasonably interfere with the operations of the organization because of the repetitious or systematic nature of the requests, or

(b) are frivolous or vexatious.

Powers of commissioner in conducting investigations, audits or inquiries

38(1) In conducting an investigation or an audit under section 36 or an inquiry under section 50 the commissioner has the power, privileges and protection of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

(2) The commissioner may

(a) examine any information in a document, including personal information, and obtain copies or extracts of documents containing information

(i) found in any premises entered under paragraph (c), or

(ii) provided under this Act,

(b) require an individual or an organization to produce documents, and

(c) at any reasonable time, enter any premises, other than a personal residence, occupied by an organization, after satisfying any reasonable security requirements of the organization relating to the premises.

(3) If information to which solicitor-client privilege applies is disclosed by a person to the commissioner at the request of the commissioner, or obtained by or disclosed to the commissioner under subsection (1) or (2)(a) or (b), the solicitor-client privilege is not affected by the way in which the commissioner has received the information.

(4) The commissioner may require an individual to attempt to resolve the individual's dispute with an organization in the way directed by the commissioner before the commissioner begins or continues a review or

investigation under this Act of an applicant's complaint against the organization.

(5) Despite any other enactment or any privilege afforded by the law of evidence, an organization must provide to the commissioner any document, or a copy of any document, required under subsection (1) or (2) (a) or (b)

(a) if the commissioner does not specify a period for the purpose, within 10 days of the date of the commissioner's request for the document, or

(b) if the commissioner specifies a period, within the period specified.

(6) If an organization is required to produce a document under subsection (1) or (2) (a) or (b) and it is not practicable to make a copy of the document, the organization must provide access for the commissioner to examine the document at its site.

(7) Subject to subsection (8), after completing a review, investigating a complaint, or conducting an audit, the commissioner must return a document, or a copy of a document, produced by the individual or organization.

(8) On request from an individual or an organization, the commissioner must return a document, or a copy of a document, produced by the individual or organization within 10 days of the date on which the commissioner receives the request.

Evidence in proceedings

39(1) The commissioner and anyone acting for or under the direction of the commissioner must not give or be compelled to give evidence in a court or in any other proceedings in respect of any information obtained in performing their duties or exercising their powers or functions under this Act, except

(a) in a prosecution for perjury in respect of sworn testimony,

(b) in a prosecution for an offence under this Act, or

(c) in an application for judicial review or an appeal from a decision with respect to that application.

(2) Subsection (1) applies also in respect of evidence of the existence of proceedings conducted before the commissioner.

Protection against libel or slander actions

40 Anything said, any information supplied or any record produced by a person during an investigation or inquiry by the commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court.

Restrictions on disclosure of information by commissioner and staff

41(1) The commissioner and anyone acting for or under the direction of the commissioner must not disclose any information obtained in performing their duties or exercising their powers and functions under this Act, except as provided in subsections (2) to (6).

(2) The commissioner may disclose, or may authorize anyone acting on behalf of or under the direction of the commissioner to disclose, information that is necessary to

(a) conduct an investigation, audit or inquiry under this Act, or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

(3) In conducting an investigation, audit or inquiry under this Act and in a report under this Act, the commissioner and anyone acting for or under the direction of the commissioner must take every reasonable precaution to avoid disclosing and must not disclose

(a) any personal information an organization would be required or authorized to refuse to disclose if it were contained in personal information requested under section 27, or

(b) whether information exists, if an organization in refusing to provide access does not indicate whether the information exists.

(4) The commissioner may disclose to the Attorney General information relating to the commission of an offence against an enactment of British Columbia or Canada if the commissioner considers there is evidence of an offence.

(5) The commissioner may disclose, or may authorize anyone acting for or under the direction of the commissioner to disclose, information in the course of a prosecution, application or appeal referred to in section 39.

(6) The commissioner may disclose, or may authorize anyone acting for or under the direction of the commissioner to disclose, information in accordance with an information-sharing agreement entered into under section 36 (1) (l).

Protection of commissioner and staff

42 No proceedings lie against the commissioner, or against a person acting on behalf of or under the direction of the commissioner, for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty, power or function under this Part or Part 11.

Delegation by commissioner

43(1) The commissioner may delegate to any person any duty, power or function of the commissioner under this Act, except the power to delegate under this section.

(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the commissioner considers appropriate.

Annual report of commissioner

44(1) The commissioner must report annually to the Speaker of the Legislative Assembly on the work of the commissioner's office under this Act.

(2) The Speaker must lay the annual report before the Legislative Assembly as soon as possible.

Part 11 -- Reviews and Orders

Definitions

45 In this Part:

"complaint" means a complaint referred to in section 36 (2);

"inquiry" means an inquiry under section 50;

"request" means a request made in writing to the commissioner under section 46 to

(a) resolve a complaint, or

(b) conduct a review;

"review" means a review of a decision, act or failure to act of an organization

(a) respecting access to or the correction of personal information about the individual who requests the review, and

(b) referred to in the request for the review.

Asking for a review

46(1) An individual who has asked an organization for access to or the correction of their personal information may ask the commissioner to conduct a review of the resulting decision, act or failure to act of the organization.

(2) An individual may make a complaint to the commissioner.

(3) If the commissioner is satisfied that section 38 (4) applies to an individual who has made a request, the commissioner may defer beginning or adjourn the review to allow an attempt to be made under that section to resolve the dispute.

How to ask for a review or make a complaint

47(1) An individual may ask for a review or make a complaint by delivering a request to the commissioner.

(2) A request must be delivered within

(a) 30 days of the date on which the person making the request is notified of the circumstances on which the request is based, or

(b) a longer period allowed by the commissioner.

(3) The time limit in subsection (2) (a) does not apply to a request respecting

(a) a failure by an organization to respond within a required time period established by this Act, or

(b) a complaint.

Notifying others of review

48(1) On receiving a request for a review, the commissioner must give a copy of the request to

(a) the organization concerned, and

(b) any other person that the commissioner considers appropriate.

(2) The commissioner may act under subsection (1) on receiving a request respecting a complaint.

Mediation may be authorized

49 The commissioner may authorize a mediator to investigate and to try to settle the matter on which a request is based.

Inquiry by commissioner

50(1) If a matter is not referred to a mediator or is not settled under section 49, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

(2) An inquiry may be conducted in private.

(3) The individual who makes a request, the organization concerned and any person given a copy of the request must be given an opportunity to make representations to the commissioner during the inquiry.

(4) The commissioner may decide

(a) whether representations are to be made verbally or in writing, and

(b) whether a person is entitled to be present during, to have access to or to comment on representations made to the commissioner by another person.

(5) The individual who makes a request, the organization concerned and any person given a copy of the request may be represented at the inquiry by counsel or by an agent.

(6) If the matter on which a complaint is based is referred under section 49 to a mediator and is not settled by the mediation, the inquiry respecting the complaint must be completed within 30 days of the day on which the mediation ends.

(7) If a complaint is not referred under section 49 to a mediator and the commissioner decides to hold an inquiry respecting the review, the inquiry must be completed within 30 days of the day on which the request is delivered under section 47 (1).

(8) An inquiry respecting a review must be completed within 90 days of the day on which the request is delivered under section 47 (1), unless the commissioner

(a) specifies a later date, and

(b) notifies

(i) the individual who made the request,

(ii) the organization concerned, and

(iii) any person given a copy of the request

of the date specified under paragraph (a).

(9) The period of an adjournment under section 46 (3) must not be included for the purpose of calculating a deadline under subsection (7) or (8) of this section.

Burden of proof

51 At an inquiry into a decision to refuse an individual

(a) access to all or part of an individual's personal information,

(b) information respecting the use or disclosure of the individual's personal information, or

(c) the names of the sources from which a credit reporting agency received personal information about the individual,

it is up to the organization to prove to the satisfaction of the commissioner that the individual has no right of access to his or her personal information or no right to the information requested respecting the use or disclosure of the individual's personal information or no right to the names of the sources from which a credit reporting agency received personal information about the individual.

Commissioner's orders

52(1) On completing an inquiry under section 50, the commissioner must dispose of the issues by making an order under this section.

(2) If the inquiry is into a decision of an organization to give or to refuse to give access to all or part of an individual's personal information, the commissioner must, by order, do one of the following:

(a) require the organization

(i) to give the individual access to all or part of his or her personal information under the control of the organization,

(ii) to disclose to the individual the ways in which the personal information has been used,

(iii) to disclose to the individual names of the individuals and organizations to whom the personal information has been disclosed by the organization, or

(iv) if the organization is a credit reporting agency, to disclose to the individual the names of the sources from which it received personal information about the individual,

if the commissioner determines that the organization is not authorized or required to refuse access by the individual to the personal information;

(b) either confirm the decision of the organization or require the organization to reconsider its decision, if the commissioner determines that the organization is authorized to refuse the individual access to his or her personal information;

(c) require the organization to refuse the individual access to all or part of his or her personal information, if the commissioner determines that the organization is required to refuse that access.

(3) If the inquiry is into a matter not described in subsection (2), the commissioner may, by order, do one or more of the following:

(a) confirm that a duty imposed by this Act or the regulations has been performed or require that a duty imposed by this Act or the regulations be performed;

(b) confirm or reduce the extension of a time limit under section 31;

(c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances;

(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;

(e) require an organization to stop collecting, using or disclosing personal information in contravention of this Act, or confirm a decision of an organization to collect, use or disclose personal information;

(f) require an organization to destroy personal information collected in contravention of this Act.

(4) The commissioner may specify any terms or conditions in an order made under this section.

(5) The commissioner must give a copy of an order made under this section to all of the following:

(a) the individual who made the request;

(b) the organization concerned;

(c) any person given notice under section 48;

(d) the minister responsible for this Act.

Duty to comply with orders

53(1) Not later than 30 days after being given a copy of an order of the commissioner, the organization concerned must comply with the order unless an application for judicial review of the order is brought before that period ends.

(2) If an application for judicial review is brought before the end of the period referred to in subsection (1), the order of the commissioner is stayed from the date the application is brought until a court orders otherwise.