

December 2013

## AN AUDIT OF SPECIAL INDEMNITIES

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**Auditor General**  
of British Columbia



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The Honourable Linda Reid  
Speaker of the Legislative Assembly  
Province of British Columbia  
Parliament Buildings  
Victoria, British Columbia  
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Dear Madame Speaker:

I have the honour to transmit to the Legislative Assembly of British Columbia my *Audit of Special Indemnities*.

In this audit, my Office examined 26 special indemnity agreements, including those granted to Mr. Basi and Mr. Virk. Through this work, we identified several opportunities for government to improve both how ongoing indemnity agreements are administered and how the cost of them is publicly reported.

In addition to paying the private legal costs funded under special indemnities, government is often responsible for funding millions of dollars of defence costs for large criminal trials where the defendants cannot afford their own defence.

In these situations, solicitor-client privilege currently prevents my Office from auditing the legal bills paid by government. In my opinion, this is unfortunate. Over the past 30 years, court proceedings have become longer, more complex, and as result, more expensive. Audit could offer an important means of helping government and the court system better manage the substantial costs of litigation – costs being footed by provincial taxpayers – while still respecting solicitor-client privilege and the independent role of lawyers and the judiciary.

My hope is that, as a result this audit, government will be encouraged to work to remove the barriers to audit created by solicitor-client privilege, so that my Office can in future examine the administration of the legal costs covered under indemnities and help government find ways to improve the management of escalating court costs.

Russ Jones, MBA, CA  
*Auditor General*  
Victoria, British Columbia  
December 2013

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**UNTIL THE MAGNITUDE** of the defence costs paid by the Province for former Ministerial Assistants Dave Basi and Bob Virk became public, government's practice of granting special indemnities was not well known.

Special indemnities were agreements under which government paid an individual's private legal costs for circumstances not covered under their terms and conditions of employment. Between 1996 and 2011, government spent more than \$11 million to honour special indemnities approved for just over 100 individuals, of which \$6.4 million went to defend Mr. Basi and Mr. Virk.

In this audit, my Office examined 26 special indemnity agreements, including those granted to Mr. Basi and Mr. Virk. Through this work, we identified several opportunities for government to improve both how ongoing indemnity arrangements are administered and how the cost of them is publicly reported.

We concluded that all of the agreements we reviewed, including those with Mr. Basi and Mr. Virk, were granted legally. We found no evidence of political interference in the decisions to grant or amend any of the indemnities. In the case of Mr. Basi's and Mr. Virk's indemnities, we found that the public servants administering the files were well aware of their professional responsibility to keep the administration of the indemnities separate from the legal process, including the trial. Senior public servants deliberately did not consult with ministers prior to making or amending indemnity decisions.

In addition to paying the private legal costs funded under special indemnities, government is often responsible for funding millions of dollars of defence costs for large criminal trials where the defendants cannot afford their own defence. Examples include the criminal cases involving William Pickton and James Bacon.

In these situations, solicitor-client privilege currently prevents my Office from auditing the legal bills paid by government. In my opinion, this is unfortunate. Over the past 30 years, court proceedings have become longer, more complex, and as result, more expensive. Audit could offer an important means of helping government and the court system better manage the substantial costs of litigation – costs being footed by provincial taxpayers – while still respecting solicitor-client privilege and the independent role of lawyers and the judiciary.

My hope is that, as a result this audit, government will be encouraged to work to remove the barriers to audit created by solicitor-client privilege, so that my Office can in future examine the administration of the legal costs covered under indemnities and help government find ways to improve the management of escalating court costs.



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**ON OCCASION**, while carrying out their duties, government employees may find themselves involved in proceedings for which they require personal legal advice. Examples include law suits, public inquiries, human rights proceedings and professional body proceedings. In these situations in most Canadian jurisdictions, the employer – that is, government – provides public servants with legal assistance and financial protection.

The British Columbia government also provided its employees with “special indemnities.” These were agreements in which government covered an individual’s legal representation costs for circumstances that were beyond the scope of the indemnity policy that was part of the standard terms and conditions of employment.

Special indemnities were granted to just over 100 individuals between 1996 and 2011. The total cost for legal representation in these cases amounted to more than \$11 million. And the majority of that – \$6.4 million – went to defend former Ministerial Assistants Dave Basi and Bob Virk from 2005 to 2010.

Government’s granting of special indemnities was based on the principle that the individuals in each case were acting in good faith within the scope of their employment. For this reason, most indemnity agreements in criminal cases included a provision requiring repayment of the legal defence costs if the individuals were found guilty.

The decision by government, before the conviction of Mr. Basi and Mr. Virk, to release the two from any obligation to repay those costs was seen by many people to run contrary to the underlying principle of good faith.

## WHY WE UNDERTOOK THIS AUDIT

In response to public concerns about the appropriateness of government funding the cost of the criminal defence for Mr. Basi and Mr. Virk, our Office initiated an audit of all special indemnities granted to individuals under the authority of the *Financial Administration Act* between 1996 and 2011.

Our purpose was to determine whether special indemnities had been granted, administered and reported on in a consistent and transparent manner, and whether the terms and conditions of the indemnity agreements had been complied with. A court decision that the *Auditor General Act* does not override solicitor-client privilege limited our access to only those agreements where the indemnified individual provided a waiver of solicitor-client privilege for the purpose of the audit. We were therefore able to access files for only 26 indemnity agreements, including those for Mr. Basi and Mr. Virk.

## WHAT WE FOUND

The 26 special indemnity agreements we examined were all granted and approved under the authority of the *Financial Administration Act*, and all payments were properly authorized. Specifically, we found that:

- ◆ Despite the lack of a policy defining roles, responsibilities and accountabilities for administering special indemnities, administrative practices were consistent over time.
- ◆ The public servants tasked with approving and administering special indemnities were diligent and fair in exercising their responsibilities. Their practices were principled and responsive to each situation; and they were kept separate and distinct from the proceedings for which the indemnity was provided.

Because of our access to only 26 indemnity files, we were unable to conclude whether our findings are representative of all special indemnities.

However, we did identify several opportunities for improvement, from the files we examined, and make eight recommendations for improving how government administers individual indemnities. While these recommendations pertain to the practices before the introduction of the *Excluded Employees (Legal Proceedings) Indemnity Regulation* in March 2012, they are still relevant because an administrative policy to support the regulation has yet to be developed.

In terms of government's public accountability for special indemnities, we found the annual reporting to be insufficient to enable Members of the Legislative Assembly and the general public to understand the total cost to British Columbians of individual special indemnity agreements. The *Financial Administration Act* requires more disclosure of the costs of indemnities than is currently being provided.

We made two recommendations for improving public reporting of special indemnities.

## SPECIAL INDEMNITIES FOR MR. BASI AND MR. VIRK

In this report, we also include two appendices that present more detailed information about the defence costs that government funded for Mr. Basi and Mr. Virk.

- ◆ [Appendix A, The Public Cost of the Basi Virk Trial](#), provides an overview of the criminal proceeding, an analysis of the \$18 million public cost of the proceeding, and an explanation of how government can end up being responsible for funding both the prosecution and defence in criminal trials. (The progression of the Basi Virk trial through the courts, the decisions of the court, and the communications between the Special Prosecutor and defence counsel were all outside of the scope of the audit as they are properly outside of the mandate of the Auditor General.)
- ◆ [Appendix B, Administration of the Special Indemnities for Mr. Basi and Mr. Virk](#), presents, as a case study, our analysis of the administration of the indemnities for Mr. Basi and Mr. Virk. These two indemnities were granted under the same authority and administered in a similar manner to all other indemnities we reviewed. The decision to amend the two indemnity agreements was appropriately made by the Deputy Minister of Finance on the advice of the Deputy Attorney General, and kept separate from the plea deal. We found no evidence of political interference in the administration of Mr. Basi's and Mr. Virk's indemnities.

Our detailed examination of these two special indemnities provides a window into government's administration of legal costs, and highlights the inability of public servants to control legal costs, given that the main cost driver is the decisions of the court.

In other words, the substantial amount paid to defend Mr. Basi and Mr. Virk was a reflection of the length and complexity of the legal proceedings rather than of government's administration of the indemnity agreements. The private legal costs paid to honour the indemnity agreements with Mr. Basi and Mr. Virk were significantly higher than the legal costs funded under any other special indemnity agreement. However, the other special indemnities we examined were not for criminal trials.

## REPORT RECOMMENDATIONS

This report includes 10 recommendations to improve how special indemnities are administered. Implementation of these recommendations will strengthen the administration of indemnities for public servants, increase accountability for decisions and assist with defining roles and responsibilities. Our recommendations take the new *Excluded Employees (Legal Proceedings) Indemnity Regulation* into account and provide further guidance based on past practices.

## WE RECOMMEND THAT:

- 1** government establish an administrative policy that defines the specific roles, responsibilities and accountabilities required to ensure the *Excluded Employees (Legal Proceedings) Indemnity Regulation* results in transparent, cost-effective, consistent and well-documented decisions.
- 2** government confirm eligibility at the conclusion of a proceeding to ensure that coverage was appropriate.
- 3** government require the individual's counsel to demonstrate that only eligible services have been submitted to government for payment.
- 4** government obtain a waiver of solicitor-client privilege for the purpose of audit at the time it agrees to fund private legal counsel for an individual.
- 5** government provide retained lawyers with guidance on how to include sufficient billing information to enable assessment of compliance with the terms of the agreement while protecting solicitor-client privilege.
- 6** government establish standard rates for private legal counsel retained under the authority of the *Excluded Employees (Legal Proceedings) Indemnity Regulation*.
- 7** administration of special indemnities for criminal matters be managed by an external individual, such as an independent lawyer or member of the Legal Services Society.
- 8** government review its options for funding costs incurred under the *Excluded Employees (Legal Proceedings) Indemnity Regulation* to ensure estimated costs are disclosed to the Legislative Assembly and actual costs are reported back to ministries.
- 9** an annual statement of all payments made to honour indemnities be included in the public accounts, as required by section 74(3) of the *Financial Administration Act*.
- 10** annual reporting to the Legislative Assembly include the number, nature and cost of indemnities granted under the *Excluded Employees (Legal Proceedings) Indemnity Regulation* that have been concluded in that year.

## JOINT RESPONSE FROM THE MINISTRY OF JUSTICE, MINISTRY OF FINANCE AND THE PUBLIC SERVICE AGENCY

**THE GOVERNMENT WELCOMES** the Auditor General's report on special indemnities and will take steps to give appropriate effect to all of his recommendations. Those steps are described in the specific responses below.

Those recommendations will assist in ensuring that coverage under the new Excluded Employees (Legal Proceedings) Indemnity Regulation is implemented in a consistent and transparent manner. That regulation came into being in March 2012, after years of policy development in which British Columbia was ahead of almost all other Canadian jurisdictions. The regulation meets all of the recommendations in the Toope report. Consistent with Professor Toope's reasoning, the rationale for providing employees with legal support is to enable them to perform their work in often difficult circumstances without fear of personal liability or the need for costly private insurance.

The government is pleased to have the Auditor General provide the public with a better understanding of why the legal expenses in the Basi and Virk prosecution were paid by government, why the total costs of the trial became so high, and why it was beyond the ability of government administrators to control defence costs.

The Auditor General's report also fully addresses publicly-expressed concerns about the circumstances surrounding the government's decision not to require Messrs. Basi and Virk to repay that money. The reasons for that decision were set out in the Deputy Attorney General's statement dated October 20, 2010. The Auditor General provides an independent and more fulsome explanation of the steps and legalities involved. The government appreciates Messrs. Basi and Virk's co-operation in allowing the Auditor General to make this additional information available to the public.

The government also appreciates receiving the Auditor General's comments about the potential role of audit in relation to third-party litigation costs payable by government. We agree that accountability and transparency may contribute to a better understanding and management of those costs. Recent experience has indeed shown that – even with a very high degree of co-operation between the government and the Auditor General's Office – barriers to audit can arise when indemnified persons decline to waive their solicitor-client privilege over lawyer billings. In those circumstances, government is prevented from providing the Auditor General with full access to indemnified persons' files. However, if privilege is to be waived for audit, sufficient safeguards must be in place to preserve and protect privilege beyond the needs and purposes of audit. We look forward to working with the Office of the Auditor General to see if it is possible to develop sufficient safeguards.

## Government's Response to Specific Recommendations

### RECOMMENDATION #1:

*We recommend that government establish an administrative policy that defines the specific roles, responsibilities and accountabilities required to ensure the Excluded Employees (Legal Proceedings) Indemnity Regulation results in transparent, cost-effective, consistent and well-documented decisions.*

As coverage under the new *Excluded Employees (Legal Proceedings) Indemnity Regulation* is being implemented, the ministries and agencies involved are at the same time developing administrative practices to meet this recommendation. It is a process of testing what works to ensure cost-effectiveness and consistency as well as transparency and documentation. The government expects the resulting administrative policy to be formalized and published on the Public Service Agency website, with updates to the policy as circumstances require.

### RECOMMENDATION #2:

*We recommend that government confirm eligibility at the conclusion of a proceeding to ensure that coverage was appropriate.*

The *Excluded Employees (Legal Proceedings) Indemnity Regulation* expressly contemplates that there will be a review of an employee's eligibility from time to time during proceedings in which coverage for legal expenses is being provided. The regulation also empowers government to terminate coverage, as well as to seek reimbursement, if the employee is found to be ineligible. The government plans to implement those time-to-time reviews as appropriate in proceedings funded under the regulation. The government is also discussing mechanisms to provide for a final review of eligibility at the conclusion of every proceeding, and views this recommendation from the Auditor General as an improvement on historical practices.

### RECOMMENDATION #3:

*We recommend that government require the individual's counsel to demonstrate that only eligible services have been submitted to government for payment.*

The government's historical practices have, in the vast majority of cases, resulted in counsel receiving payment only for eligible services, as the Auditor General recommends. Only on very rare occasions has counsel failed or been unable to differentiate between work that is covered and work that is not. The difficulty lies in counsel's inability to break down legal advice given for dual purposes. The government will consider how that difficulty can be addressed in order to meet the Auditor General's recommendation in all cases.

### RECOMMENDATION #4:

*We recommend that government obtain a waiver of solicitor-client privilege for the purpose of audit at the time it agrees to fund private legal counsel for an individual.*

The government will consider requiring a waiver of an indemnified employee's solicitor-client privilege for purposes of audit, subject to the safeguards referred to above. Legislative amendments may be needed to give effect to this recommendation.

## **RECOMMENDATION #5:**

*We recommend that government provide retained lawyers with guidance on how to include sufficient billing information to enable assessment of compliance with the terms of the agreement while protecting solicitor-client privilege.*

The government's standard retainers already include the requirement to describe billed work by each lawyer to the one-tenth of an hour, in addition to providing detailed instructions on permitted disbursements, and general guidance on confidentiality and privilege. To meet the Auditor General's recommendation, more specific guidance will be developed on how to follow those billings requirements while still preserving solicitor-client privilege.

## **RECOMMENDATION #6:**

*We recommend that government establish standard rates for private legal counsel retained under the authority of the Excluded Employees (Legal Proceedings) Indemnity Regulation.*

The government has historically based hourly rates paid under special indemnities on the rates it pays to outside counsel retained to represent the government. It has typically taken the Legal Services Branch tariff as a starting point for that purpose, with written approval required for anything higher. Collateral attempts to negotiate higher rates through the Deputy and Assistant Deputy Attorney General are now almost invariably unsuccessful. Even so, and to meet the Auditor General's recommendation for purposes of section 26(2) of the *Excluded Employees (Legal Proceedings) Indemnity Regulation*, a set of standard rates will be formalized and published for coverage in non-criminal cases, recognizing that on extraordinary occasions it will be necessary and/or appropriate to pay at a different rate. The regulation requires that rates for prosecutions be set by an independent reviewer appointed for that purpose.

## **RECOMMENDATION #7:**

*We recommend that administration of special indemnities for criminal matters be managed by an external individual, such as an independent lawyer or member of the Legal Services Society.*

Consistent with the recommendations of Professor Toope, the *Excluded Employees (Legal Proceedings) Indemnity Regulation* already mandates an external reviewer as a requirement for coverage of an accused person in a criminal prosecution. The reviewer's role is to set the terms and conditions of defence counsel's retainer including a maximum total amount; to approve increases to the maximum amount only if needed to ensure a fair trial; and to review counsel's accounts and certify them for payment. In the Basi and Virk prosecution, reviewers were appointed for those very purposes. However, as the Auditor General recognizes, the ability of reviewers to control overall costs is usually very limited, because the main cost driver is the way a case unfolds before the court. Further, any government control that might be seen to direct defence strategy would be contrary to a fair trial.

## **RECOMMENDATION #8:**

*We recommend that government review its options for funding costs incurred under the Excluded Employees (Legal Proceedings) Indemnity Regulation to ensure estimated costs are disclosed to the Legislative Assembly and actual costs are reported back to ministries.*

The government will consider its options for funding costs, as recommended by the Auditor General. We agree that estimated costs should be disclosed to the Legislative Assembly and actual costs should be reported back to ministries. However, at present, we consider there may be impediments to implementing a voted appropriation model, as suggested in the Auditor General's report.

## **RECOMMENDATION #9:**

*We recommend that an annual statement of all payments made to honour indemnities be included in the public accounts, as required by section 74(3) of the Financial Administration Act.*

While payments on indemnities have been reported in the public accounts, they have not been specifically identified as such. The government will, in future, supplement this disclosure by also publishing with the public accounts a separate discrete statement of indemnity payments.

## **RECOMMENDATION #10:**

*We recommend that annual reporting to the Legislative Assembly include the number, nature and cost of indemnities granted under the Excluded Employees (Legal Proceedings) Indemnity Regulation that have been concluded in that year.*

It is not the current practice of the government to report to the Legislative Assembly annually on the total cost of indemnities granted under the *Excluded Employees (Legal Proceedings) Indemnity Regulation* that have been concluded during the year and there is nothing in that regulation requiring such reporting. The government will consider implementing this recommendation through appropriate changes to policy and/or the regulation.

## BACKGROUND

### Why was this audit initiated?

On October 18, 2010, former BC Ministerial Assistants Dave Basi and Bob Virk pleaded guilty to breach of trust charges, ending five months of trial<sup>1</sup> and a lengthy legal proceeding that started in January 2005 when charges were laid. Their legal defence was funded by government under indemnity agreements, as allowed by section 72 of the *Financial Administration Act*.

A term of the indemnity agreements, as originally granted, was that Mr. Basi and Mr. Virk would be required to repay their defence costs if they were convicted and when the period for appeal had expired. However, two days after they entered guilty pleas and were convicted, the Deputy Attorney General issued a public statement saying that he and the Deputy Minister of Finance had decided, prior to the conviction, to release Mr. Basi and Mr. Virk from any obligation to repay over \$6 million in legal defence costs.

This decision led to public concerns about the appropriateness of government funding legal defence costs for individuals who plead guilty to criminal charges, and it appeared inconsistent with the intent of providing legal assistance to protect employees who are acting in good faith.

In response to the concerns, the Auditor General initiated an audit of the total cost to government for the Basi Virk trial and an audit of all special indemnities granted to individuals under the authority of the *Financial Administration Act* between 1996 and 2011.

### Why would government pay an employee's private legal costs?

Government employees, while carrying out their employment duties, may sometimes find themselves involved in proceedings for which they request personal legal advice. These proceedings include law suits, public inquiries, human rights proceedings, and professional body proceedings (for example, to address complaints to the BC College of Social Workers or BC Law Society).

In most jurisdictions, public servants acting in good faith are provided with legal assistance and financial protection for legal proceedings that arise out of, or in the course of, that employment. Governments consider this practice to be one way of encouraging qualified individuals to join the public service with the assurance that they will have legal support, should they need it, in performing their work.

Employees faced with a criminal investigation or criminal prosecution for matters *unrelated* to their employment are, of course, not entitled to an employer indemnity.

The main focus of this report is on the results of our audit of special indemnities, including the indemnities granted to Mr. Basi and Mr. Virk. Although the Basi Virk trial was not within the scope of this audit, we do include in the report our analysis of the total cost of the trial to government.

<sup>1</sup> The Basi Virk trial is the criminal case R. v. Basi, 2010 BCSC 1622.

However, they do have three other options for coverage: use their personal funds; apply for low income legal aid; or apply to the courts for a Rowbotham Order (see text box), which results in a stay (suspension or cancellation) of the legal proceedings until government agrees to fund the person’s defence costs.

Criminal trials can be large, complex and expensive. Because many citizens cannot afford the cost of a criminal defence, government will pay the defence costs – under a Rowbotham Order – if a particular criminal trial is deemed to be in the public interest.

In recent years, in response to the prospect of Rowbotham Orders, the provincial Ministry of Justice funded the defence for the accused in several large criminal cases, including for William Pickton (a convicted serial killer) and the Surrey Six (trial for alleged gang members).

## What are special indemnities?

Indemnities are integral to the business of government. Many events and activities would not occur if government did not indemnify businesses, non-profit organizations, local governments and individuals against possible future claims or losses that could arise from their involvement with government. An indemnity is a form of insurance for organizations doing business with government or providing programs to government clients. For example, government provides indemnities to community sports organizations to enable children in government care to participate. Hundreds of indemnities like this, related to the business operations of government, are approved every year under the authority of the *Financial Administration Act*.

Government also provides indemnity protection to its employees as part of their terms and conditions of employment, under the authority of the *Public Service Act*. For unionized employees, this protection is included in their collective agreements. For excluded (non-unionized) employees, the protection is established by the Public Service Agency (PSA) and documented in its policy<sup>2</sup>.

For the purpose of this report, a special indemnity is an agreement in which the government chooses to cover an individual’s legal costs for circumstances not covered by PSA’s terms and conditions of employment. Special indemnities are granted and approved on a discretionary basis under the *Financial Administration Act*, not the *Public Service Act*. The term “special indemnity” is used informally to distinguish these legal representation agreements for individuals from the hundreds of other indemnity agreements approved each year as part of the operations of government.

Special indemnities have been granted, infrequently, in response to a need for legal representation for a situation that had not been anticipated when the Public Service Agency indemnity policy was developed in the late 1980s. Of the many indemnities approved under the authority of the *Financial Administration Act* each year between 1996 and 2011, special indemnities accounted for about 1%.

Between 1996 and 2011, over 100 individuals were covered under approximately 90 special indemnity agreements that authorized payment of \$11 million in legal representation costs. The majority of this expense – \$6.4 million – was paid to defend Mr. Basi and Mr. Virk between 2005 and 2010. For the other individuals, the average

### Rowbotham Order

In their 1998 decision of *R. v. Rowbotham*, the Ontario Court of Appeal created the Rowbotham Order. It works like this: A person facing criminal charges, and without the means to pay for a defence, can apply to the courts for the order. If a trial judge concludes that the accused needs a lawyer to have a fair trial, the judge can order a stay of proceedings until the government agrees to provide the necessary funding for counsel.

Such applications arise, for example, where the accused is not eligible for legal aid because his or her income is too high.

Before being granted a Rowbotham Order, an accused must show that he or she has no further resources to contribute to the defence. Only then does he or she become eligible for government funding.

An **indemnity** is an agreement where one party agrees to protect another party against possible future claims or losses. An indemnity agreement essentially transfers the risk of potential loss from one party to another.

2 The PSA indemnity policy was superseded by the *Excluded Employees (Legal Proceedings) Indemnity Regulation* on March 30, 2012.

cost of legal representation was \$45,000 and the median cost was \$11,000. In some files, no costs were incurred at all. (See [Appendix D](#) for a listing of concluded special indemnities).

## What was government’s special indemnity policy?

When we started the audit, there was no established policy specific to special indemnities, although efforts to draft one had been initiated several times, beginning in 1994. However, the eligibility principles in the PSA indemnity policy were always referenced in determining whether to grant a special indemnity. Although special indemnities were granted in exceptional circumstances not covered in PSA policy, they were treated as extensions of the PSA policy.

The PSA indemnity policy included provisions for employees sued for damages, and outlined the circumstances when an indemnity could be provided to initiate or defend a law suit for defamation. The policy did not provide for coverage of the costs of legal representation for defendants in or witnesses to:

- ◆ criminal investigations and prosecutions,
- ◆ professional association complaints,
- ◆ public inquiry appearances,
- ◆ human rights proceedings, and
- ◆ other government initiated reviews and investigations.

Also, the PSA policy was limited to specific employees appointed under the *Public Service Act*. It did *not* apply to Ministers, Ministerial Assistants, Officers of the Legislature and individuals contracted to work for government.

Between 1996 and 2011, government received requests for coverage on matters not previously contemplated by the PSA policy. Legal advice and representation were sought by witnesses in legal proceedings, individuals accused in criminal proceedings, and employees facing prosecution for regulatory offences.

The basis for granting special indemnities evolved on a case-by-case basis. Most approvals were based on what had been done in the past. Occasionally, a request for a special indemnity went beyond situations that had been previously approved. Approval of those requests set a precedent for similar future circumstances.

[Exhibit 1](#) summarizes the government’s efforts to establish a special indemnity policy.

### Excerpt From PSA Policy

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

Source: Public Service Agency Terms and Conditions for Excluded Employees, 2011

**Exhibit 1:** Special indemnity policy development

Date	Policy Development
1994	The Ministry of Attorney General begins drafting an indemnity policy to apply to legal representation authorized both by the Public Service Agency (PSA) indemnity policy and through special indemnities.
1996	The Minister of Finance grants, under section 72 of the <i>Financial Administration Act</i> , a “standing” indemnity that provides the Premier and Cabinet Ministers the same coverage available to excluded employees under existing PSA policy.
1998-2002	The policy development process accelerates. In 2002, versions of the draft policy go to Cabinet twice. Neither draft is approved.
2002–2011	Policy development continues, with several drafts being prepared. Legal Services Branch references the draft policy in its decisions to recommend the coverage that was approved from time to time.
May 2011	<p>The Attorney General requests Professor Stephen Toope, President and Vice-Chancellor of the University of British Columbia, to conduct a review of government’s employee indemnity practice.</p> <p>Professor Toope’s recommendations included that government ensure specific conditions be met before public servants receive non-criminal indemnifications, and that government create a specific policy regarding indemnification in criminal matters.</p>
March 2012	A new regulation under section 72 of the <i>Financial Administration Act</i> – the <i>Excluded Employees (Legal Proceedings) Indemnity Regulation</i> – replaces the PSA policy as the authority for indemnifying excluded employees for the costs of legal representation for proceedings arising from their work. The regulation provides coverage in circumstances defined under the former PSA policy and all circumstances previously covered by special indemnities.

## AUDIT PURPOSE AND SCOPE

We carried out this audit to determine whether special indemnities were granted, administered and reported in a consistent and transparent manner, and in compliance with the terms and conditions of the indemnity agreements. To do this we asked:

- ◆ Did a legal and administrative framework exist to ensure that decisions to grant and amend special indemnities were authorized, consistent and transparent?
- ◆ Did government have appropriate mechanisms in place to ensure that the financial obligations assumed in granting special indemnities were effectively managed, appropriately authorized and in compliance with the applicable indemnity agreement?
- ◆ Were reporting practices within government and to the Legislative Assembly sufficient to ensure that government was accountable for obligations assumed and expenditures incurred under special indemnities?

We based our audit objectives and criteria on the *Financial Administration Act*, the *Guarantees and Indemnities Regulation*, the Public Service Agency indemnity policy, indemnity provisions in collective agreements, indemnity policies from other Canadian jurisdictions, and principles of administrative fairness.

The scope of the audit included all special indemnities granted under the authority of section 72 of the *Financial Administration Act* between April 1996 and March 2011. We also examined government accounting records from 2004 to 2011 to determine the total cost of the Basi Virk trial to government. This work was conducted under section 11(8) of the *Auditor General Act* and the standards for assurance engagements established by the Canadian Institute of Chartered Accountants.

## SCOPE LIMITATION

The *Auditor General Act* states that “despite any other enactment, the Auditor General, in the conduct of the Auditor General’s duties, must be given access to records, information and any explanations from a person or organization for the Auditor General to exercise the powers and perform duties of the Auditor General.”

Based on this authority, the audit plan assumed that the audit team would receive full access to all government records related to special indemnities and have the ability to select a sample of files to reflect the range of practice over time.

However, government concluded that because the special indemnity files included retainers with and invoices from legal counsel, the records were confidential and potentially subject to solicitor-client privilege. Government, therefore, allowed our Office full access only to files where the indemnified individual provided a waiver of solicitor-client privilege for the purpose of this audit.

With these waivers, the audit team was able to access files for 26 of approximately 90 indemnity agreements which accounted for 70% of the total amount paid to honour special indemnities. These files included 18 of the 32 agreements initially selected for our sample. Waivers were given solely at the discretion of the indemnified individuals.

Even with access to 26 agreements, the files examined were not representative of all the different types of proceedings covered through special indemnities. For instance, there were no examples of indemnities granted to cover the cost of legal counsel for witnesses in public inquiry proceedings or respondents in conflict-of-interest proceedings. In addition, we were unable to examine two large group indemnity agreements included in our original sample that provided coverage for 11 and 13 individuals respectively, as not everyone waived privilege.

As a result, we are not able to provide audit conclusions on two of the three audit objectives. However, we are able to report our findings for indemnities to which access was granted. Exhibit 2 summarizes the number of indemnified individuals granted an indemnity between 1996 and 2011, and the number of indemnified individuals who provided a waiver of privilege for audit purposes.

### Solicitor-client privilege

is a right that belongs to a lawyer’s client. It means that the lawyer must keep confidential any information communicated to him or her while providing legal services. Only the client in question has the ability to waive (voluntarily give up) this privilege.

**Exhibit 2:** Indemnified individuals who provided a waiver for audit purposes

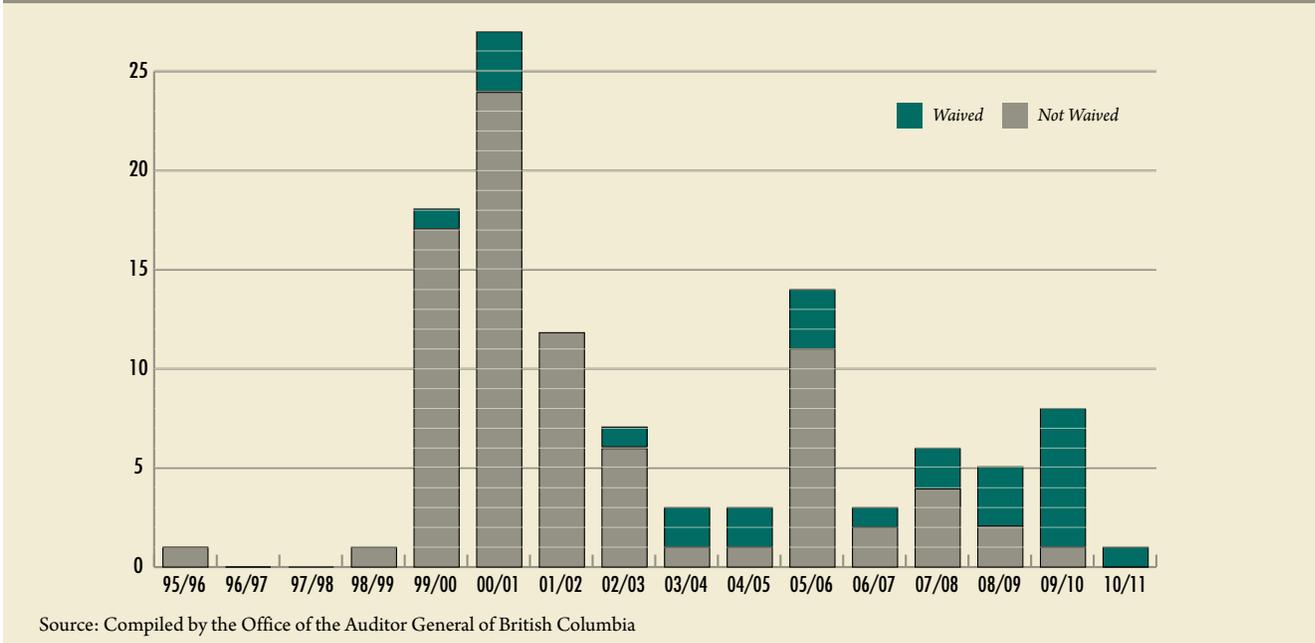


Exhibit 3 summarizes the steps the Auditor General took to gain access to government records for this audit.

Exhibit 3: Accessing Government Records	
Date	Accessing Government Records
November 2010	The Auditor General advises Legal Services Branch of his intent to examine the total cost to government of the Basi Virk trial. Government waives its own privilege over records in the indemnity files that are not subject to a claim of privilege by the indemnified individuals. However, government restricts access to records that it believes are confidential and subject to Mr. Basi’s and Mr. Virk’s solicitor-client privilege. Consequently, the Auditor General petitions the courts for access to documents subject to Mr. Basi’s and Mr. Virk’s solicitor-client privilege.
June 2011	Shortly before the court hearing, Mr. Basi and Mr. Virk waived solicitor-client privilege over all records and information concerning their legal defence costs, and in the possession of government for the purpose of audit. On that basis, the Court confirms that the Auditor General be given access to those records and information. Access is given.
July 2011	The Auditor General initiates a performance audit of special indemnity practices. The Ministry of Justice considers itself to be legally constrained from giving the Office of the Auditor General complete access to indemnity files unless individuals provide waivers of privilege or there is a court order enabling the government to give access. The Ministry sought waivers from all of the individuals who received special indemnities, but only some of them were prepared to grant a waiver. The Auditor General petitions the courts for access to all special indemnity records in the possession of government, as well as to the Basi Virk documents in the possession of the external lawyers hired to review the billings.
January 2013	The BC Supreme Court rules that the <i>Auditor General Act</i> does not provide the Auditor General with the power to access those records subject to solicitor-client privilege, and that no further access can be provided without waivers from the individuals indemnified.

## OVERALL CONCLUSIONS

Because of the [scope limitation](#), we are unable to provide audit conclusions on two of the three audit objectives. However, we are able to report our findings for those indemnities for which access was granted.

**OBJECTIVE 1:** *Did a legal and administrative framework exist to ensure decisions to grant and amend special indemnities were authorized, consistent and transparent?*

We found that all 26 special indemnities we examined were granted under the appropriate authority. However, in the absence of a formal administrative policy, responsibilities and accountabilities did not always align, and the rationale for decisions was not always well-documented.

Because we had access only to indemnities where individuals had waived solicitor-client privilege, we were unable to conclude whether these findings were representative of all special indemnity files.

**OBJECTIVE 2:** *Did government have appropriate mechanisms in place to ensure that the financial obligations assumed in granting special indemnities were effectively managed, appropriately authorized and in compliance with the applicable indemnity agreement?*

For the 26 files we examined, we found that all payments were appropriately authorized. However, government did not always have sufficient information from legal counsel to be able to ensure that the terms and conditions of the indemnity agreement had been complied with. Furthermore, although Legal Services Branch implemented various mechanisms to attempt to control costs, they were often ineffective, particularly when the matter covered was a criminal investigation or trial.

Again, because we had access only to indemnities where the individuals had waived solicitor-client privilege, we were unable to conclude whether these findings were representative of all special indemnity files.

**OBJECTIVE 3:** *Were reporting practices within government and to the Legislative Assembly sufficient to ensure that government was accountable for obligations assumed and expenditures incurred under special indemnities?*

Although there is annual reporting of the special indemnities that are approved, the amounts paid each year to honour special indemnities are not disclosed separately in the public accounts, as required by section 74(3) of the *Financial Administration Act*. Further, there is no reporting of the total costs paid once a proceeding has concluded. The current reporting is not sufficient to allow Members of the Legislative Assembly to understand the amount and nature of the financial obligations assumed under special indemnities.

## KEY FINDINGS AND RECOMMENDATIONS

### Granting and Amending Special Indemnities

To guide the process of granting and amending special indemnities, and to ensure properly authorized, consistent and transparent decisions, an administrative policy is necessary – one that clearly defines roles, responsibilities and accountabilities for decision-making.

We found that although there was a legal framework for authorizing and approving special indemnities, no formally approved administrative policy existed.

#### *Legal Framework*

Section 72 (1) of the *Financial Administration Act*, together with the *Guarantees and Indemnities Regulation*<sup>3</sup>, provides the general authority for government to grant and amend indemnities. The sole requirement to be met before government grants a special indemnity is prior written approval from the Minister of Finance or prior written assurance from the Director of Risk Management Branch that the proposal for the indemnity has been reviewed and accepted by the Risk Management Branch. Every special indemnity agreement we examined had been approved in compliance with this requirement, and each approval explicitly referenced section 72 of the *Financial Administration Act*.<sup>4</sup>

The legislation does not specifically refer to amendments. It is well accepted in law that if you have the authority to grant something, you have the authority to amend it. Six amendments had been made to the indemnity agreements we examined. We found that all of these amendments had also been approved, consistent with this legal framework: four were approved by the Director of Risk Management Branch and two were approved by the Deputy Minister of Finance, as the Minister of Finance.

#### *Administrative Policy*

A special indemnity agreement consists of two parts: the Indemnity and a Legal Representation Agreement.

The Indemnity details:

- ◆ the facts giving rise to the indemnity;
- ◆ the scope of the indemnity;
- ◆ details on how private counsel will be retained, instructed and paid;
- ◆ terms for terminating the indemnity; and
- ◆ any obligations to reimburse the Province.

The Legal Representation Agreement is a schedule to the Indemnity, and becomes the contract between the Province and the lawyer retained to provide the legal advice authorized by the Indemnity. The Legal Representation Agreement defines the terms of the retainer with the lawyer, including hourly rates and maximum amount payable under the retainer.

<sup>3</sup> B.C. Reg. 258/87, *Financial Administration Act*.

<sup>4</sup> Section 23(1) of the *Interpretation Act* extends the authority of a Minister in an enactment to include the Minister designated to act in the office and the Deputy or Associate Deputy of the Minister.

Although Legal Services Branch recommends the form of the Indemnity, the terms of it and any amendments to those terms must be approved by the Director of Risk Management Branch or the Minister of Finance. Legal Services Branch enters into and administers the Legal Representation Agreement, and the Risk Management Branch of the Ministry of Finance pays for the legal fees incurred. This relationship is further explained in [Appendix C](#).

The lack of a formally approved administrative policy resulted in practices where responsibilities and accountabilities did not always align. This challenge is highlighted in the following examples:

- ◆ Although Risk Management Branch was responsible for funding costs incurred under special indemnity agreements, Legal Services Branch was responsible for determining and approving hourly rates and maximum amounts to be paid to private counsel. Nine of the 26 Legal Representation Agreements we reviewed were amended to increase the maximum amount that counsel could bill for legal advice; and for five of those agreements, the maximums were increased more than once. There was no requirement for Risk Management Branch to approve this increase in allowable costs: the amendments were approved by the Assistant Deputy Attorney General, Legal Services Branch, under the authority of the *Attorney General Act*. The office responsible for funding the legal costs, therefore, had no role in approving agreement amendments – even though most of those amendments resulted in additional costs.
- ◆ Although the Public Service Agency is responsible for human resource management practices and policies in government, the agency was not consulted on any of the files we reviewed, either to provide advice on eligibility for coverage under the PSA policy or to assess whether the issue was within the scope of an individual’s employment duties.
- ◆ In the absence of clearly defined roles and responsibilities, there is a risk of normal administrative processes being circumvented when decisions are made. We found no evidence of political interference in the administration of the 26 indemnity files we examined. However, in three of the files we reviewed, we saw evidence of the individual or his or her lawyer directly approaching the Assistant Deputy Attorney General of Legal Services Branch or the Deputy Attorney General – rather than the lawyer responsible for the indemnity file – to request more favourable terms.
  - In one file, the supervising lawyer successfully declined the request.
  - In another file, the Assistant Deputy Attorney General, rather than the supervising lawyer, authorized a number of increases to the maximum amount.
  - In the third file, the Deputy Attorney General overruled Legal Service Branch’s concerns, in response to a request from the Deputy Minister to the Premier to pay ineligible costs if they were reasonable. This resulted in \$2,900 being paid for services in relation to the request for a special indemnity which were not eligible for coverage.

**RECOMMENDATION 1:** *We recommend that government establish an administrative policy that defines the specific roles, responsibilities and accountabilities required to ensure the Excluded Employees (Legal Proceedings) Indemnity Regulation results in transparent, cost-effective, consistent and well-documented decisions.*

## Eligibility for Coverage under a Special Indemnity

Between 1996 and 2011, government spent approximately \$11 million for legal representation costs provided under special indemnity agreements. The rationale for providing an indemnity, whether for a civil or a criminal matter, is the same: to protect an individual from personal liability for legal expenses arising from conduct in good faith in the performance of his or her employment. An assessment of an individual's eligibility for a special indemnity is necessary to ensure that funding the individual's legal expenses is in the public interest.

We found that government consistently considered whether a decision to fund legal representation costs was in the public interest based on an assessment of whether the individual had acted in the performance of his or her employment and done so in good faith.

### *Good Faith*

For non-criminal proceedings, government operates on the presumption that an employee has acted in good faith unless evidence exists to suggest otherwise. We found that government consistently considered the issue of good faith in determining whether to grant special indemnities for non-criminal proceedings.

For criminal matters, determining whether an employee's conduct was in good faith is left for the courts to decide. (Were government to assess this, an employee might be obligated to provide information that he or she would not be compelled to disclose in court.) We found that, with respect to criminal investigations or proceedings, eligibility was based solely on whether the matter arose from the individual's performance of employment.

Although the issue of good faith is considered in the decision to grant a special indemnity, we found no evidence in the 26 files we examined to indicate that government had made any effort to confirm good faith once the proceedings had concluded, regardless of the outcome. Given that the issue of good faith is central to the public interest test, government should, at the conclusion of the proceeding, revisit the issue of whether an employee acted in good faith. If government finds evidence of misconduct or lack of good faith, it should pursue recovery of amounts expended under the indemnity agreement.

**RECOMMENDATION 2:** *We recommend that government confirm eligibility at the conclusion of a proceeding to ensure that coverage was appropriate.*

## *Keeping Ministerial Activities Separate from Constituency Activities*

Cabinet members are only eligible for special indemnity coverage for matters related to their work as Ministers, not for matters related to their political work as MLAs on behalf of their constituents. This is because, in their ministerial capacity, Ministers are part of the executive branch of government while MLAs are part of the legislative branch. We found this principle was consistently applied by Legal Services Branch in granting and administering special indemnities for Cabinet members.

We noted two examples in which Legal Services Branch clearly differentiated between ministerial and constituency activities with respect to two Ministers who were to appear as witnesses in a criminal proceeding. Legal Services Branch made it clear to legal counsel that coverage extended only to their client's role as a Minister and not as an MLA.

Despite the fact that government had advised counsel that it would only pay for services related to ministerial work, we found one indemnity file where the individual's lawyer did not effectively distinguish between ministerial and MLA roles to ensure government was charged only for legal advice related to ministerial work.

**RECOMMENDATION 3:** *We recommend that government require the individual's counsel to demonstrate that only eligible services have been submitted to government for payment.*

## **Availability of Records for Audit**

Audits are independent assessments of the performance of government and are an important function that supports the democratic process and a responsible, accountable government.

Although the *Auditor General Act* provides the authority for the Auditor General to access government records, many records supporting decisions to provide and extend coverage under a special indemnity – including records supporting the payment of legal invoices – were not available to our Office for this audit. We had access only to those files for which individuals waived their solicitor-client privilege.

Legal staff at the Ministry of Justice, as Officers of the Court and members of the Law Society, are obliged to keep confidential those records they believe to be subject to solicitor-client privilege. Government is not a party to this solicitor-client privilege; the privilege exists between the indemnified individual and his or her own counsel.

The responsibility of the Ministry of Justice with respect to protecting solicitor-client privilege was confirmed by the Supreme Court of British Columbia on January 29, 2013. In his Reasons for Judgment, Chief Justice Bauman concluded that the powers of access in the *Auditor General Act* did not override solicitor-client privilege. Consequently, the Auditor General was allowed full access only to those files where the indemnified individual had waived privilege or there was a court order granting access.

We found that all special indemnity agreements since 2001 stated that the total amount funded under the special indemnity could be made public once the proceedings were complete. However, there was no provision in the agreements requiring the records themselves be made available for audit once the proceedings were complete. As a condition

of receiving government-financed legal advice, a term should be included that requires individuals to waive solicitor-client privilege for the purpose of audit. This term would enhance the transparency of the indemnity practice, and would not be unprecedented. For example, the Legal Services Society, which provides legal aid in British Columbia, already requires clients to waive solicitor-client privilege for audit purposes.

**RECOMMENDATION 4:** *We recommend that government obtain a waiver of solicitor-client privilege for the purpose of audit at the time it agrees to fund private legal counsel for an individual.*

## Ensuring Compliance with the Agreements

Invoices from legal counsel, submitted to government for payment, must include sufficient non-privileged information to allow government to determine – before the bills are paid – whether the services provided comply with the indemnity agreements.

We reviewed the supporting documentation for legal costs funded under the 26 special indemnities to which we had access. We found that the majority of the invoices were sufficiently detailed, enabling government to assess whether:

- ◆ the rates charged were in accordance with the Legal Representation Agreement between government and counsel;
- ◆ the dates of service were within the effective dates of the indemnity; and
- ◆ the legal services provided were consistent with the defined coverage.

However, five files contained invoices where information was insufficient to determine if the services were in compliance with the scope and terms of the indemnity agreement.

**RECOMMENDATION 5:** *We recommend that government provide retained lawyers with guidance on how to include sufficient billing information to enable an assessment of compliance with the terms of the agreement while protecting solicitor-client privilege.*

## Mechanisms to Control Costs

Ministers and Deputy Ministers have a statutory responsibility to ensure appropriate control of public money.

We found that the financial arrangements established under the terms of special indemnity agreements included mechanisms to support how public funds were to be accounted for, controlled and managed.

Implementation of these mechanisms was mostly successful:

- ◆ *Legal Services Branch, in an effort to control costs, consistently established an effective date of indemnity coverage, and negotiated hourly rates and maximums with retained counsel* – These terms were included in the Legal Representation Agreement that was a schedule to each indemnity agreement.
- ◆ *Most invoices were signed by the individual indemnified and appropriately reviewed and authorized by government* – Staff at both Legal Services Branch and Risk Management Branch reviewed each invoice to ensure that amounts billed were for eligible dates, based on approved hourly rates, and not in excess of the maximum amount established in the Legal Representation Agreement.
- ◆ *Documentation to support cost management was lacking* – Although approved invoices supported each payment, many files did not have sufficient documentation for an evaluation of how effective Legal Services Branch was in establishing and managing to firm dates, rates and maximum amounts.

### Maximums

At the time a special indemnity is granted, it is unclear what the proceedings will involve and the extent of legal representation that the individual may require. The structure of each Indemnity provides for coverage of the matter, without defining timelines or the total amount of legal fees that will be paid under the Legal Representation Agreement. However, an initial maximum cost amount is defined in the Legal Representation Agreement to establish a budget for legal counsel. If the maximum needs to increase, counsel must contact Legal Services Branch and negotiate an increase based on the circumstances of the proceeding.

### Hourly Rates

When the Ministry of Justice contracts with private counsel, rates are usually negotiated according to a ministry fee schedule that sets hourly rates based on the lawyer’s number of years of experience, up to a maximum of \$250 an hour. Higher rates cannot be paid without written approval of the Assistant Deputy Attorney General.

In practice, however, as Legal Services Branch told us, it is difficult to adhere to this fee schedule where the lawyer being retained under a special indemnity has previously negotiated a higher rate with the Ministry of Justice for other matters, or where the lawyer is aware of the ministry paying rates that exceed the fee schedule.

In each of the files we reviewed, we found that private counsel was chosen by the individual being indemnified, often before the indemnity was granted. The rates paid to private counsel varied from file to file, and each rate was negotiated separately by Legal

### Benefits of a Published Transparent Fee Schedule

Based on anecdotal information about what other publicly funded lawyers were being paid on other cases, the lawyers in *R. v Bacon* sought to negotiate higher hourly rates than the government was prepared to pay. The lawyers then applied for a form of Rowbotham Order, arguing that government control over rates interfered with the right to a fair trial. The judge denied the application, but in her reasons for judgment observed:

“It is the lack of transparency that lends to the criticism ... that the Attorney General is, or may be, somehow using the power of the public purse in an arbitrary manner to interfere with an accused person’s choice of counsel. The benefits of a published, transparent fee schedule ... without recourse to negotiations, would eliminate counsel’s criticism of arbitrariness and the appearance of preferential treatment to some counsel and some accused persons.”

Source: Justice Stromberg Stein, *R. v Bacon*, 2011 BCSC 135

Services Branch. Rates for lead counsel were usually within the range set by the Ministry of Justice fee schedule, but in one case were almost double the maximum under that schedule. It is unclear from the files how the rates were determined. We were advised the rates were generally based on the fee schedule used by Legal Services Branch when it retains outside counsel to represent government in civil matters.

We also noted that all Legal Representation Agreements we reviewed included a clause to allow the indemnified individual to personally pay his or her lawyer, over and above the amounts set out in the agreement. Individuals could request additional legal advice or retain a more expensive lawyer if they were willing to pay the additional cost. The clause gives government the flexibility to adhere to its fee schedule without limiting the legal advice that individuals can obtain. We did not see any evidence of this provision being used by the individual being indemnified.

**RECOMMENDATION 6:** *We recommend that government establish standard rates for private legal counsel retained under the authority of the Excluded Employees (Legal Proceedings) Indemnity Regulation.*

### *Requirement for Reimbursement*

The requirement to repay if evidence of misconduct emerged was made explicit in agreements established after 2006. Almost all of the special indemnity agreements we reviewed could be terminated if evidence of misconduct or bad faith had emerged. All indemnities for criminal matters included a requirement for reimbursement of legal costs if a conviction occurred.

Because of our limited access to indemnity files, we were unable to evaluate the effectiveness of this reimbursement provision. However, in what we could audit, we saw no examples of government assessing whether the concluded matter had resulted in any evidence of misconduct or bad faith, and no examples of government requesting repayment.

### *Managing Defence Costs for Criminal Proceedings*

Government's efforts to manage publicly funded defence costs require balancing a responsibility to the legal process with a responsibility to the taxpayer. In the case of an indemnity for a criminal investigation or trial – where government is funding both the prosecution and the defence – the tension between respecting the legal process and respecting fiscal stewardship increases.

Any effort by government to control or restrict defence funding could be seen as a restriction to the defendant's right to a fair trial. For example, introducing an absolute funding cap on the legal representation available to a defendant in a criminal proceeding could be problematic as it could be seen to interfere with the legal process. In this case, government's obligation to the legal process will override efforts to control costs.

We believe that the appointment of an external manager for special indemnities would: establish greater separation between defence cost management and prosecution cost management; remove any appearance of conflict of interest; and make it easier to enforce maximum cost amounts and hourly rates without appearing to be influencing the defence. An independent lawyer (external to government) or the Legal Services Society could serve as this external manager.

**RECOMMENDATION 7:** *We recommend that administration of special indemnities for criminal matters be managed by an external individual, such as an independent lawyer or member of the Legal Services Society.*

## Funding the Cost of Special Indemnities

The approval of a special indemnity under the authority of the *Financial Administration Act* creates a statutory obligation for government to pay approved legal representation costs. Between 1996 and 2011, in compliance with the *Financial Administration Act's* requirement to pay, government funded the costs incurred under special indemnities in one of three ways:

- ◆ The Ministry of Justice funded the cost from its annual voted appropriations;
- ◆ The individual's ministry funded the cost from its annual voted appropriations; or
- ◆ The costs were paid through the Insurance and Risk Management Account.

Ministry voted appropriations authorize spending for one year only. In contrast, the Insurance and Risk Management Account (IRMA) is a special account and, as a special account, any unspent balance does not lapse at the end of each year.

It is difficult to budget for the costs of special indemnities, as there is no certainty regarding the length of the proceedings or the legal costs required to resolve a matter covered by a special indemnity. Consequently, most costs related to special indemnities have historically been funded by the IRMA special account. Special accounts, their purposes, and often their source of revenue, are established through legislation.

### *The Insurance and Risk Management Account*

The government's Insurance and Risk Management Account is a special account established to operate the insurance or risk management services provided to ministries and government organizations. This account and its programs are administered by the Risk Management Branch of the Ministry of Finance.

The large programs operated through this account are insurance programs provided predominantly for schools, universities and colleges, health authorities, and Crown corporations. The participating organizations pay premiums into this special account to cover insurance claims.

This special account also funds the cost of services that Risk Management Branch provides to ministries, including the costs incurred for legal services under special indemnities. However, ministries do not pay premiums to cover the cost of these services.

The Insurance and Risk Management Account receives an allocation from government representing interest earned on the special account balance. This notional interest is used to cover the cost of risk management services provided to ministries and a portion of it is attributed to each large insurance program as investment income on pool balances.

## *Impact of Funding Special Indemnities through IRMA*

Prior to 2008, the interest allocated to the Insurance and Risk Management Account was sufficient to both grow the insurance program investments held on behalf of public sector organizations for the purpose of funding future claims and to cover the cost of providing risk management services to ministries. However, by July 2008, the notional interest earnings were not sufficient to cover the legal costs incurred under special indemnity agreements, specifically the indemnities for Mr. Basi and Mr. Virk.

In response, government increased the interest rate to align with the rate that private insurance programs earn through investments. This increased interest rate ensured there were sufficient funds in the account to cover the costs of indemnities and still grow the insurance funds. Although this resolved an immediate funding issue, it did not improve or clarify responsibility for managing legal representation costs funded under special indemnities.

Budgeting for the costs of indemnities under a voted appropriation, rather than a special account, would promote increased transparency and accountability as the budget would be voted on by the Legislative Assembly. The process of reviewing and debating the budget would provide an opportunity for members to better understand historical costs of indemnities granted in relation to employment. Similarly, ministries should be aware of the legal costs being paid to support their employees through indemnities. These are costs of employment and associated with their employees carrying out their duties. To improve transparency and accountability for costs incurred under the new indemnity regulation, as well as to ensure consistency in how government accounts for employee related costs, government should consider a model where costs are charged to a voted appropriation, such as the contingency vote.

**RECOMMENDATION 8:** *We recommend that government review its options for funding costs incurred under the Excluded Employees (Legal Proceedings) Indemnity Regulation to ensure estimated costs are disclosed to the Legislative Assembly and actual costs are reported back to ministries.*

## **Accountability for Coverage Provided**

The *Financial Administration Act* establishes two reporting requirements for indemnities. Section 72(8) requires that the Minister of Finance provide the Legislative Assembly with an annual report of all indemnities and guarantees approved by Cabinet or Treasury Board in the preceding fiscal year. Section 74(3) requires that a statement of all payments made to honour indemnities and guarantees be included in the Public Accounts for that fiscal year.

Given these requirements, we expected to find that the cost of special indemnities were reported annually to the Office of the Comptroller General and included in the Public Accounts. We also expected to see annual reporting to the Legislative Assembly describing the number and nature of special indemnities approved and any known financial obligations created.

Ministries provide a listing of approved indemnities and guarantees to the Office of the Comptroller General at the end of each fiscal year. This information is used to prepare an annual report for the Legislative Assembly, which lists the general purpose for each indemnity and guarantee approved in that year. As indemnities do not require Cabinet

or Treasury Board approval, this report of approved indemnities exceeds the legislated reporting requirement of 72(8).

However, there is no reporting that satisfies the requirement of section 74(3). Although the public accounts include a Schedule of Payments Made to Honour Guarantees, it does not include a similar schedule of payments made to honour indemnities. The costs incurred under special indemnities are included in the Public Accounts each fiscal year, but not in a discrete statement as required by section 74(3). As a result, Members of the Legislative Assembly and the public are not able to understand the annual cost of special indemnities or the total cost of each special indemnity.

**RECOMMENDATION 9:** *We recommend that an annual statement of all payments made to honour indemnities be included in the public accounts, as required by section 74(3) of the Financial Administration Act.*

We also noted that all special indemnity agreements since 2001 have included a provision that the total amount funded under each one may be made public once the proceedings are complete. Although no system currently exists for reporting these costs, we see no reason why this information cannot be provided to the Legislature.

Annual reporting of the total costs funded under any employee indemnity concluded in the fiscal year would provide stakeholders with information on the number and cost of special indemnities, consistent with the terms of the indemnity agreement and without compromising solicitor-client privilege. (See [Appendix D- Costs of Concluded Special Indemnities](#))

**RECOMMENDATION 10:** *We recommend that the annual reporting to the Legislative Assembly include the number, nature and cost of indemnities granted under the Excluded Employees (Legal Proceedings) Indemnity Regulation that have been concluded in that year.*

**THIS REPORT INCLUDES** 10 recommendations to improve how special indemnities are administered. Implementation of these recommendations will strengthen the administration of indemnities for public servants, increase accountability for decisions and assist with defining roles and responsibilities.

Our Office will follow-up with government within the next year to learn how it has addressed the recommendations in this report, and to determine if further work by our Office is required.

We also look forward to working with government on the issue of solicitor-client privilege to enable our Office to audit the costs paid to private legal counsel.

## OVERVIEW OF THE TRIAL

**ON DECEMBER 21, 2004**, in the provincial court of Victoria, Dave Basi and Bob Virk, two Ministerial Assistants, were charged with breach of trust and fraud related to leaking information about the sale of BC Rail to CN Rail. On January 28, 2005, the Special Prosecutor chose to directly indict the two men in the Supreme Court of Vancouver. These charges arose out of an RCMP investigation that began on April 1, 2002, and included the execution of search warrants at the Legislature on December 28, 2003.

The start date of the trial was delayed from June 5, 2006, to May 17, 2010, for several reasons: the number of applications related to disclosure and privilege; the complexity of the disclosure issues; the volume of documents disclosed; and the number of individuals involved.

Forty-two court decisions were made during this criminal proceeding.

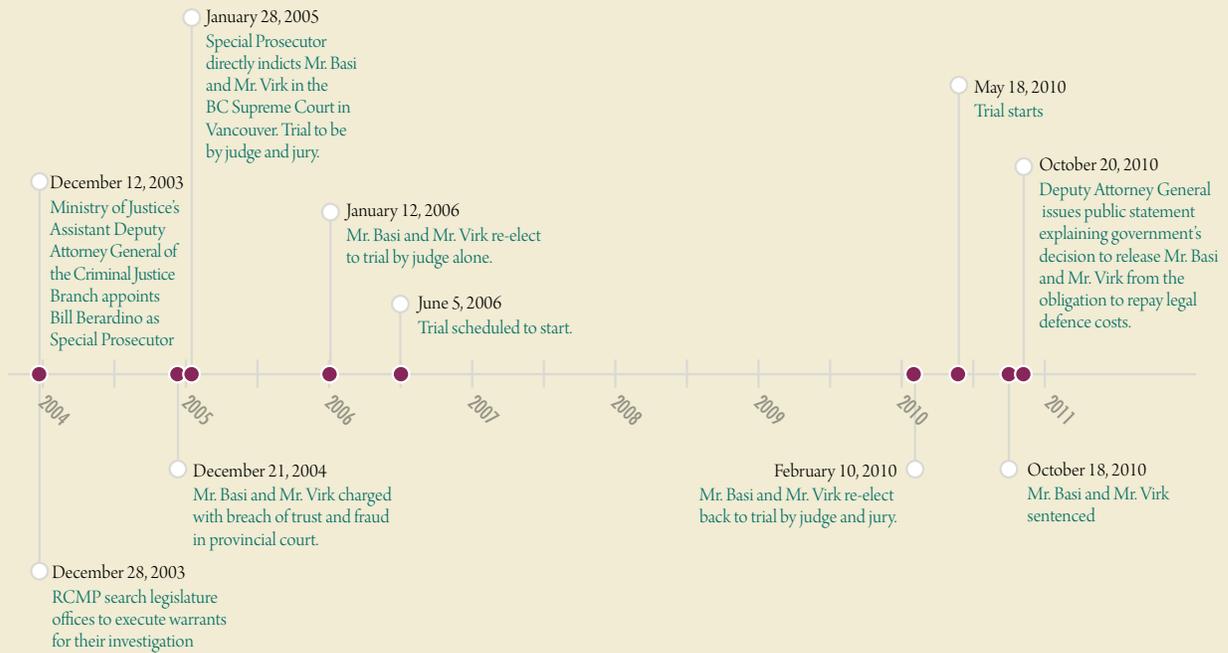
At the start of the trial, the Crown named more than 40 potential witnesses. During the trial's first two months, the court heard from only two witnesses: Martyn Brown, Chief of Staff to Premier Gordon Campbell and Brian Kenning, a former BC Rail Director. *The Globe and Mail* reported on August 23, 2010, that Special Prosecutor Bill Berardino asked the court for a week-long delay so the Crown could restructure its case and eliminate more witnesses in a bid to speed up the trial. *The Globe and Mail* article also reported that the BC Rail case had been plagued by numerous delays relating to the massive disclosure of confidential government files, and because of illnesses of the accused and jury members.

The Basi Virk trial ended on October 18, 2010 with guilty pleas from both men. They pleaded guilty with the understanding that, as a result of the agreement to release, their guilty pleas would not result in an obligation to repay the legal costs funded under their indemnity agreements.

### Complexity of Basi Virk Trial

Between June 2005 and the start of the Basi Virk trial in May 2010, the court issued almost 30 decisions regarding issues of disclosure and/or privilege. As Justice Bennett noted in her June 4, 2007, decision: "This case is complex and involves volumes of material. Already over 100,000 documents have been disclosed by the Crown in electronic form."

**Exhibit 4:** Key events in the Basi Virk criminal investigation and trial.

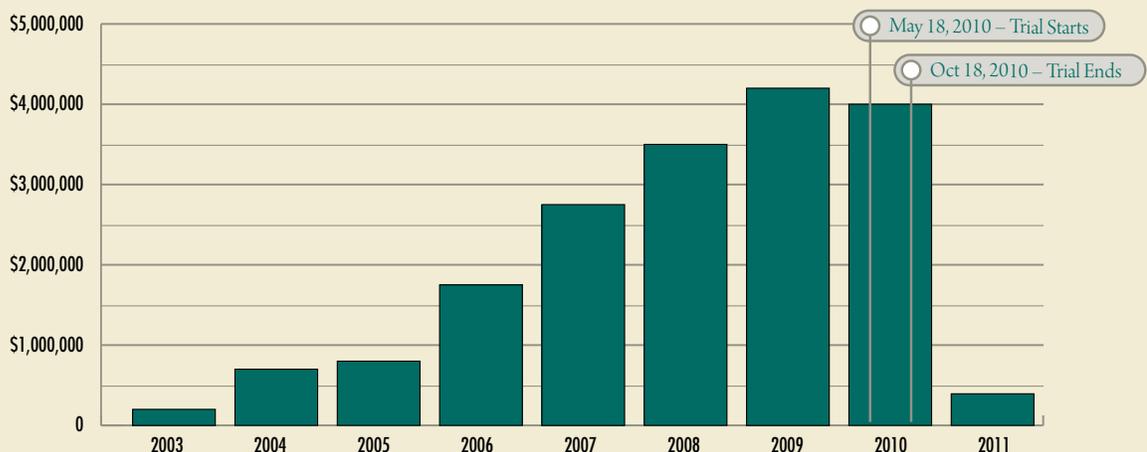


Source: Compiled by the Office of the Auditor General of British Columbia

## TOTAL COST TO GOVERNMENT OF THE BASI VIRK TRIAL

We audited government accounting and administrative records supporting the prosecution, defence, witness, disclosure, policing and court services costs funded in relation to the Basi Virk trial between 2003 and 2011. We calculated that the public cost of the Basi Virk trial, as of June 30, 2011, totalled \$18.3 million.

**Exhibit 5:** Public cost of the Basi Virk trial by year, 2003–2011



Source: Compiled by the Office of the Auditor General of British Columbia

## Criminal Justice Branch and Prosecution Costs

The Criminal Justice Branch in the Ministry of Justice was responsible for retaining a special prosecutor and administering the costs of the prosecution for the Basi Virk trial. The total cost of the prosecution between 2004 and 2011 was \$8.1 million (see [Exhibit 6](#)).

The existence and independence of the Criminal Justice Branch is established by the *Crown Counsel Act*, which grants the branch sole responsibility for determining when charges will be laid and when to conduct those prosecutions.

The *Act* allows the Assistant Deputy Attorney General of the Criminal Justice Branch to appoint a special prosecutor from outside of government if he or she considers it to be in the public interest. Special prosecutors are appointed to cases where there is significant potential for a real or perceived conflict of interest over the decisions and conduct of a prosecution, such as when a Cabinet Minister, senior government worker or police officer is involved.

The Assistant Deputy Attorney General independently decides whether to appoint a special prosecutor and who to appoint. Once appointed, special prosecutors operate independently of the Ministry of Justice to decide whether to prosecute, and to conduct the prosecution if charges are laid. If the Attorney General, the Deputy Attorney General or the Assistant Deputy Attorney General of the Criminal Justice Branch provides any instructions to a special prosecutor, those instructions must be in writing and published publicly in the *BC Gazette*.

In the Basi Virk case, the Assistant Deputy Attorney General appointed the Special Prosecutor on December 12, 2003, to review the investigation and determine whether to lay charges against Mr. Basi and Mr. Virk. Just over two years later, on January 28, 2005, the Special Prosecutor formally laid charges and began the prosecution.

No instructions from the Attorney General, the Deputy Attorney General or the Assistant Deputy Attorney General appeared in the *BC Gazette* during the investigation or the trial. This indicates that the Special Prosecutor, independent of the Criminal Justice Branch and independent of the Ministry of Justice, made the decision to prosecute and the decision to enter into guilty-plea discussions with Mr. Basi and Mr. Virk.

## Legal Services Branch and Defence Costs

Legal Services Branch in the Ministry of Justice was responsible for administering the legal representation costs incurred under the special indemnities for the defendants, Mr. Basi and Mr. Virk. The total cost of the defence for Mr. Basi and Mr. Virk was \$6.4 million (see [Exhibit 6](#)).

This cost was funded through the Insurance and Risk Management Account, a special account managed by the Risk Management Branch of the Ministry of Finance.

As well, Legal Services Branch was responsible for administering an additional \$1.7 million related to the defence of Mr. Basi and Mr. Virk, also funded through the Insurance and Risk Management Account (see [Exhibit 6](#)). This covered the cost of establishing and administering:

A special prosecutor is an external lawyer hired under the *Crown Counsel Act* to investigate and prosecute offenders independently of the Criminal Justice Branch and independently of the Ministry of Justice.

- ♦ agreements with Reviewers – the external counsel hired to review and approve the bills from Mr. Basi and Mr. Virk’s lawyers on behalf of government;
- ♦ special indemnities for six witnesses in the Basi Virk trial; and
- ♦ contracts to enable compliance with court-ordered disclosure of government documents.

## OTHER COSTS OF THE TRIAL

The costs to government for the Basi Virk trial also included those for staff time in Legal Services Branch and Court Services, as well as for policing services. In addition to administering the indemnities, Legal Services Branch lawyers were actively involved in the trial in relation to document disclosure issues and independent of the special indemnity agreements. The estimated public cost of these other resources was \$2.1 million (see Exhibit 6).

<b>Exhibit 6:</b> Government-funded cost of the Basi Virk trial	
<b>Prosecution costs</b>	
	<b>\$8,065,000</b>
<b>Defence costs</b>	
Mr. Basi defence costs	\$3,073,000
Mr. Virk defence costs	\$3,345,000
<b>Total defence costs</b>	<b>\$6,418,000</b>
<b>Legal advice for witnesses</b>	
	<b>\$161,000</b>
<b>LSB contracted costs</b>	
Reviewer costs for Mr. Basi and Mr. Virk indemnity agreements	\$83,000
FOI and disclosure costs	\$1,479,000
<b>Total LSB contracted costs</b>	<b>\$1,562,000</b>
<b>Other attributed costs</b>	
Legal Services Branch	\$979,000
Court services	\$129,000
Estimate of provincial share of policing services under Provincial Police Services Agreement	\$984,000
<b>Total other attributed costs</b>	<b>\$2,092,000</b>
<b>Total government-funded costs</b>	<b>\$ 18,298,000</b>

Source: Compiled by the Office of the Auditor General of British Columbia

## WHY WAS THE BASI VIRK TRIAL SO EXPENSIVE?

Over the past 30 years, criminal trials have become longer, more complex and, as a result, more expensive. In their 2008 *Report of the Review of Large and Complex Criminal Cases Procedures*, the Honourable Patrick L. LeSage and Professor Michael Code identified three developments that have led to the increasing length and complexity of criminal trials:

1. The effect of the *Charter of Rights and Freedoms* on Criminal Law and Criminal Procedure – The *Charter* created new rights under the Canadian Constitution and introduced remedies for breaches of those rights. This has led to lawyers making complex procedural arguments to enforce the *Charter* provisions, a process that takes time for the courts to hear and decide.
2. The Supreme Court of Canada's changing of the laws of evidence from a rules-based approach to a flexible, principles-based approach – The principled approach is more complex, uncertain and case-specific. Lawyers, therefore, now spend much more time (and money) arguing about which evidence should or should not be admitted to the court.
3. Statutory amendments over the past 25 years to the *Criminal Code*, the *Canada Evidence Act* and the *Youth Criminal Justice Act* – The *Criminal Code* is twice the size it was 30 years ago. The legislation is complex and has lengthened criminal proceedings.

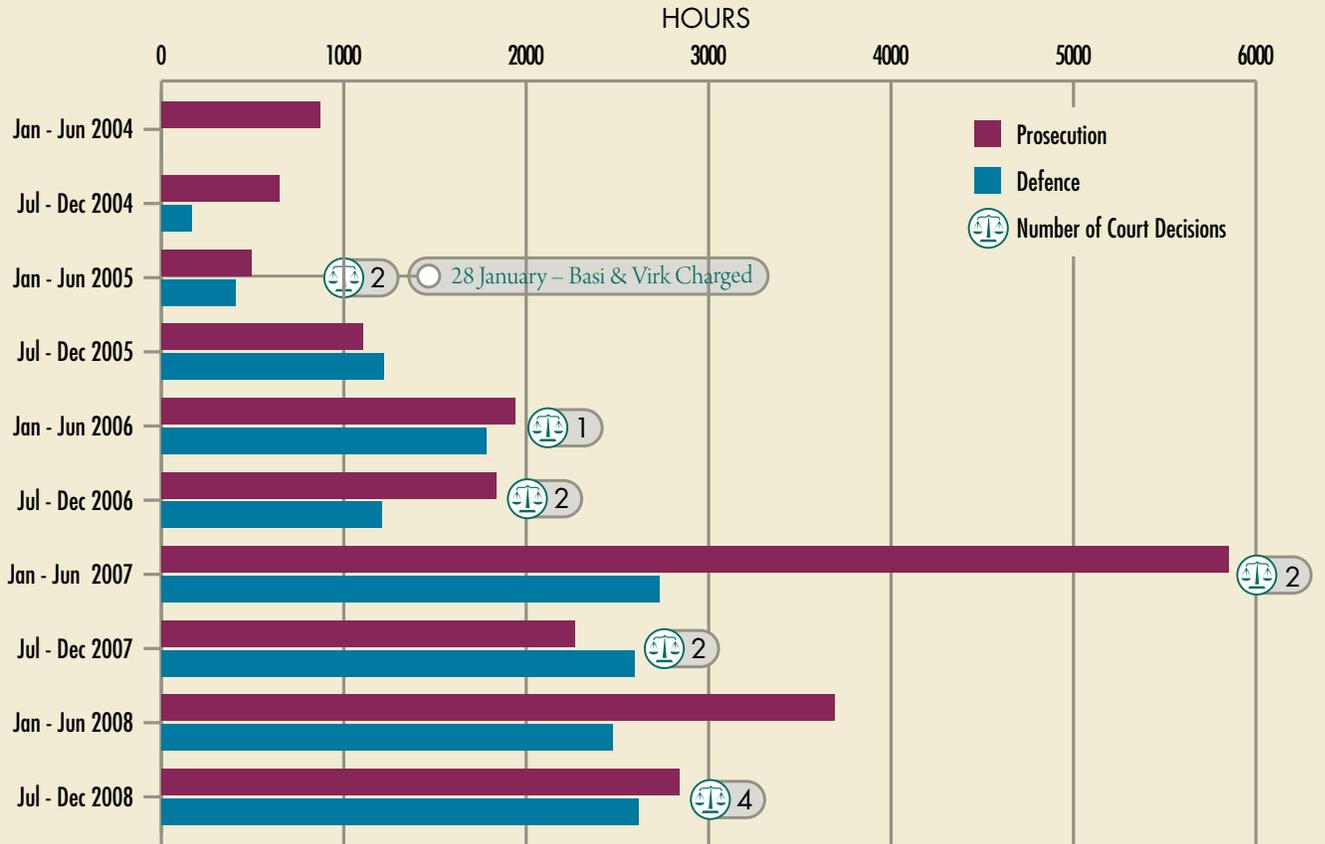
In the case of the Basi Virk trial, the pre-trial proceedings lasted for five years and included an exceptional number of disputes over disclosure, issues of privilege and constitutional challenges related to search warrants and wiretap surveillance.

During the proceedings, pre-trial and trial, 42 court decisions were made. The time required by defence and prosecution counsel to prepare for and argue each issue is reflected in the total costs. Our analysis of the hours billed by defence counsel and prosecution counsel, in the context of these court orders, is presented in [Exhibits 7](#) and [8](#).

In addition, the venue for the Basi Virk trial was in Vancouver, but the defence counsel for Mr. Virk was based in Victoria and incurred travel costs which were paid by government. We were unable to determine why the trial was held in Vancouver and not in Victoria where the offence was committed, where the evidence from the police investigation was located, and where government records were stored.

# APPENDIX A - THE PUBLIC COST OF THE BASI VIRK TRIAL

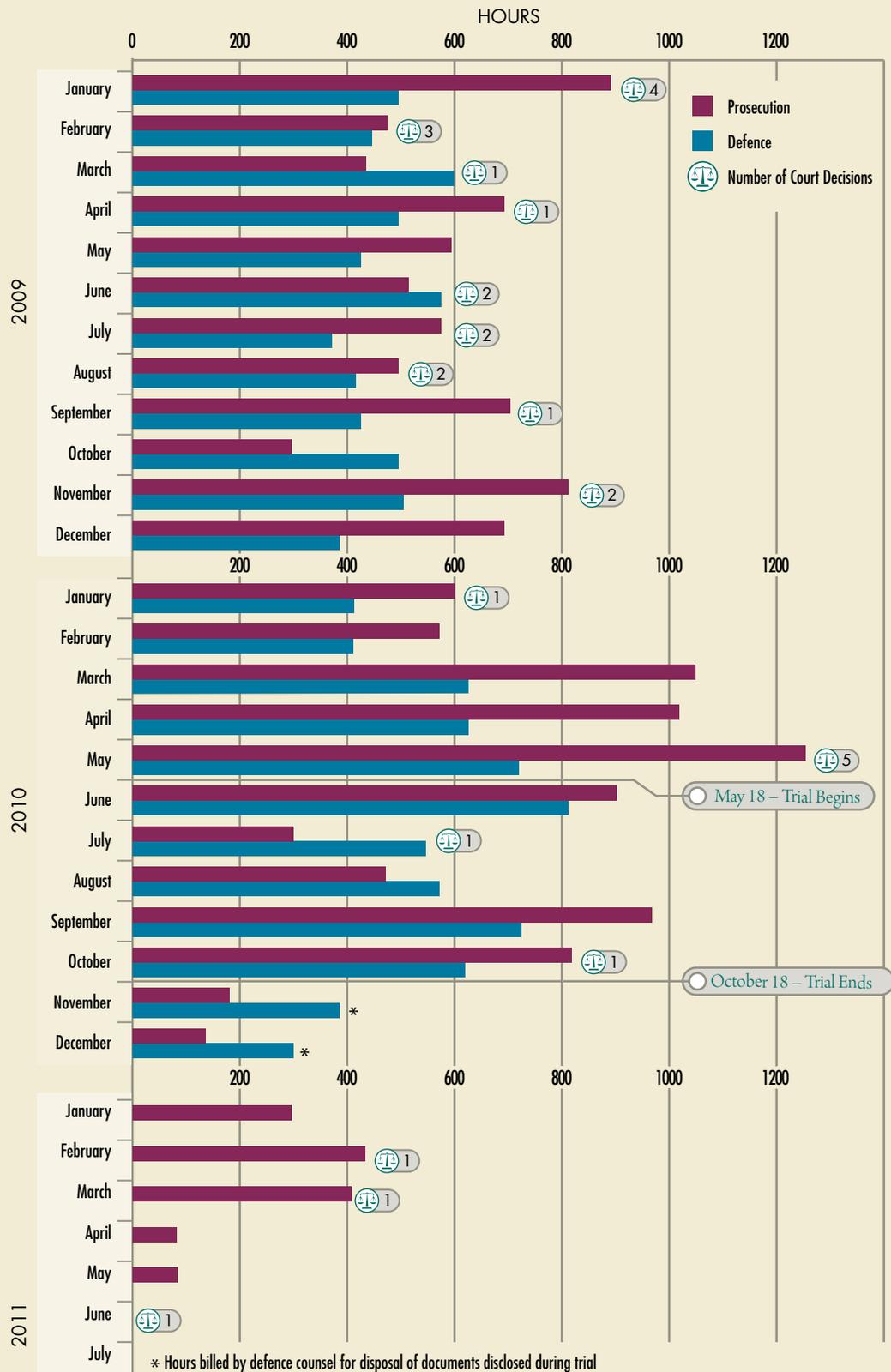
**Exhibit 7:** Hours billed by counsel for defence and prosecution, Basi Virk trial (2004-2008)



Source: Compiled by the Office of the Auditor General of British Columbia

# APPENDIX A - THE PUBLIC COST OF THE BASI VIRK TRIAL

Exhibit 8: Hours billed by counsel for defence and prosecution, Basi Virk trial (2009-2011)



Source: Compiled by the Office of the Auditor General of British Columbia

**GOVERNMENT GRANTED EIGHT SPECIAL** indemnities in relation to the Basi Virk trial. Two were for Mr. Basi and Mr. Virk, the accused in the trial. The other six were for public servants and elected officials who were expected to be called as witnesses at the trial. All eight of these indemnities were included in our audit sample of 26 agreements that resulted in the findings and recommendations presented in the [Detailed Report](#). This section of the report provides additional details on how government granted, administered and amended the indemnities for Mr. Basi and Mr. Virk. There are no recommendations specific to the administration of these two special indemnities.

Our examination of the indemnities granted to Mr. Basi and Mr. Virk was limited to the documents for which the two defendants had waived solicitor-client privilege. This meant the audit team was able to review the approximately 10,000 documents contained in the government files supporting the men's indemnities.

Mr. Basi and Mr. Virk did not waive solicitor-client privilege over records in the possession of the Reviewers. We were therefore unable to:

- ♦ meet with the Reviewers to understand how they determined that services provided were in compliance with the indemnity agreements; and
- ♦ assess the effectiveness of the Reviewers in controlling defence costs.

## ELIGIBILITY FOR COVERAGE

The approach by Legal Services Branch to determining the eligibility of Mr. Basi and Mr. Virk for a special indemnity was consistent with past practice: government had indemnified employees facing criminal proceedings and had also indemnified Ministerial Assistants. (See [Eligibility for Coverage under a Special Indemnity](#))

The first time an individual was indemnified for defence costs relating to a criminal charge was in the mid-1990s. We were unable to review government's rationale for indemnifying that individual as no waiver of solicitor-client privilege for the purpose of the audit was provided. However, we were advised that the rationale for that first decision was subject to detailed analysis in the context of the indemnity policy project, and the ministry later established a procedure to be followed for subsequent indemnities for criminal proceedings.

Given the complexity of the legal proceedings in the Basi Virk case, Legal Services Branch took additional measures to determine eligibility for coverage. Government hired an independent lawyer to interview Mr. Basi and Mr. Virk and determine whether the charges arose out of the performance of their employment, and whether Mr. Basi's indemnity agreement could be structured to ensure that it did not cover costs for

representation for criminal charges<sup>5</sup> unrelated to his work.<sup>6</sup>

Both legal opinions concluded that the matters arose directly from their duties as Ministerial Assistants and that Mr. Basi's indemnity could be structured in such a way that the government would not pay for any other criminal matters.

## ADMINISTERING THE INDEMNITIES FOR MR. BASI AND MR. VIRK

### Approval

The special indemnities for Mr. Basi and Mr. Virk, like all of the other special indemnities we reviewed, were approved by the Ministry of Finance under section 72 of the *Financial Administration Act*. Given the high profile of the criminal investigation, the Deputy Minister of Finance was asked to approve these indemnities, rather than the Director, Risk Management Branch, as was the typical practice. (See [Granting and Amending Special Indemnities](#)).

### Potential for Political Involvement in Decisions

We interviewed current and former public servants who had responsibility for granting, amending and administering these two indemnity agreements. We also reviewed records related to these two indemnity agreements at various branches of government. Based on our interviews and file reviews, we found no evidence of any political involvement in the decisions to grant or administer the indemnities to Mr. Basi and Mr. Virk. The audit team found consistent evidence that decisions were made by public servants, independent of elected officials, and that ministers were informed of decisions only after the decisions were made and implemented.

### Additional Terms and Conditions

The indemnity agreements established for Mr. Basi and Mr. Virk were consistent with those for previous indemnities. The agreements included:

- ◆ a listing of the facts giving rise to the indemnity,
- ◆ the scope of the indemnity,
- ◆ details on how private counsel would be retained, instructed and paid,
- ◆ terms for terminating the indemnity, and
- ◆ any obligations to reimburse the Province.

Because of the political nature of the criminal charges and the anticipated complexity of the trial, government implemented further measures to avoid any conflict of interest and to control costs. For instance, Mr. Basi and Mr. Virk's indemnities contained four

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5 Mr. Basi was also facing charges concerning a marijuana cultivation operation that was operating out of his Shawnigan Lake property. Those charges were stayed.

6 On June 21, 2005, the BC Supreme Court issued an order stating that this independent lawyer, who was also to review Mr. Basi and Mr. Virk's legal bills, owed a duty of confidentiality and privilege to Mr. Basi and Mr. Virk to the same extent as if she was in a solicitor-client relationship with them.

terms that we did not see in any of the other indemnity agreements we reviewed:

1. A lawyer external to government (the Reviewer) was retained to review invoices from defence counsel and approve amounts for payment.
2. The payments made under the indemnities were referred to as loans to be repaid if Mr. Basi or Mr. Virk were convicted and once the appeal period had expired.
3. Mr. Basi and Mr. Virk were required to provide the Province with security over all of their assets. Legal Services Branch did extensive due diligence to determine what assets each of them owned for that purpose. The Province also obtained additional security from family members and required that any assets surplus to family needs be sold and the proceeds contributed towards paying defence costs.<sup>7</sup>
4. The Province had the discretion to implement a holdback up to 25% of any amounts paid to defence counsel to be released only if Mr. Basi and Mr. Virk were acquitted. The intent of this provision was to provide an incentive for defence counsel to manage their hours.

No other special indemnity agreements we examined characterized the payments as loans or required the indemnitee to provide the Province with security over their assets. Rather, the other agreements simply provided for reimbursement to government if there was a conviction, or if evidence of misconduct or bad faith emerged.

Although the word “loan” was used in Mr. Basi’s and Mr. Virk’s indemnity agreements, no loan agreement with repayment terms and interest was established. We learned that the purpose of the loan language was to put Mr. Basi and Mr. Virk, if they were convicted, in the same financial position that they would have been in if they had not been eligible for an employer indemnity and were funded by government through a Rowbotham Order (See [Detailed Report](#) for definition). Upon conviction, Mr. Basi and Mr. Virk would owe all of their assets to the government.

Characterizing the payments as loans also let the Province register security against Mr. Basi and Mr. Virk’s assets and prevented Mr. Basi and Mr. Virk from disposing of their assets during the trial.

Part of the reason that government was interested in preventing Mr. Basi or Mr. Virk from disposing of their assets was because of the Province’s recent experience funding the defence costs of Rupidaman Singh Malik, a defendant in the Air India trial. The security provisions in the Basi Virk case were modeled on those used in the Malik case, after the Province funded his defence costs. The purpose of these provisions was to enhance and facilitate recovery of any money owing (see textbox).

The *Excluded Employees (Legal Proceedings) Indemnity Regulation* that was introduced in 2012 now gives government the discretionary authority to require security for coverage amounts that may become repayable in criminal proceedings.

## The British Columbia court decision *R. v. Malik* outlines the Province’s dispute with Rupidaman Singh Malik.

In November 2001, the Province entered into an interim agreement to pay the costs of Malik’s defence on the promise of repayment by him, regardless of the outcome of the trial. At the time he entered the agreement with Legal Services Branch, Malik claimed a net worth of almost \$12 million. The Province agreed to begin funding Malik’s legal defence so his trial could begin. The reason for this arrangement was that Malik asserted that liquidating his assets for his legal fees would take time.

When the Province attempted to obtain security over his property for the indemnity, Malik claimed that his assets belonged to his family and that he was insolvent (unable to pay his debts). Legal Services Branch terminated the agreement and Malik applied for a Rowbotham Order. His application was rejected. Malik then entered into another agreement with the Province, wherein the Province committed to continuing to fund his legal defence, and he would provide security in the form of two mortgages on his property.

After Malik was acquitted in March 2005, the Province demanded repayment. Malik refused to repay and initiated a claim of malicious prosecution against the Province in March 2007. In February of 2012, the Province recovered \$6.3 million from Malik for his legal costs and interest.

<sup>7</sup> Under this provision, Mr. Basi paid \$60,000 of his proceeds from the sale of his Shawnigan Lake rental property to his defence counsel.

## MECHANISMS TO CONTROL COSTS AND ENSURE COMPLIANCE WITH MR. BASI AND MR. VIRK'S INDEMNITIES

Mr. Basi and Mr. Virk's special indemnities included the same mechanisms to manage costs as did all other indemnities we examined:

- ♦ negotiated hourly rates,
- ♦ maximum retainer amounts,
- ♦ requirements for reimbursement, and
- ♦ defined dates for coverage.

For Mr. Basi and Mr. Virk's indemnities, government introduced two additional controls:

- ♦ the use of a Reviewer system; and
- ♦ holdbacks on the amounts paid to defence counsel.

As we noted in [Section 5 – Mechanisms to Control Costs](#), the ability of government to control costs while respecting the legal process – particularly for a criminal trial – is limited. For a criminal proceeding that lasted over five years, the impact of this limitation was significant. The total defence cost, including the cost of the Reviewers, was \$6.5 million. The cost of the prosecution was \$8.1 million (see [Exhibit 6](#)).

### Maximum Amounts

The initial maximums established in the Legal Representation Agreements (\$550,000 for Mr. Basi and \$500,000 for Mr. Virk) were much higher than the average initial maximums for special indemnities and reflected government's expectation that proceedings would be complex. However, in interviews with us, Ministry of Justice employees explained that neither they nor defence counsel anticipated how long, complex and costly the pre-trial proceedings would be. The maximum amounts were increased five times for Mr. Basi's indemnity and six times for Mr. Virk's indemnity. Each increase was approved by the Assistant Deputy Attorney General of the Ministry of Justice.

One of the reasons the proceedings were so costly was that they were characterized by an exceptional number of pre-trial disputes over disclosure, issues of solicitor-client, executive and informer privilege, and constitutional challenges of search warrants and wiretap surveillance. The Special Prosecutor successfully appealed – after losing at the trial and appeal court level – the issue of informer privilege to the Supreme Court of Canada.

### Rates

The hourly rates Legal Services Branch negotiated with defence counsel were consistent with the rates for a private bar lawyer and those negotiated under a Rowbotham Order, and were comparable to those paid to the Special Prosecutor and his senior associate. Further, the rates were at the low end of hourly rates negotiated for the 26 files examined.

## The Reviewer System

Legal Services Branch sought to arrange the administration of the indemnities to avoid any conflict of interest or the perception that government was impeding the defence. To this end, as with Air India and other major criminal and civil cases involving public funding, the branch established a “Reviewer system” in which outside counsel was hired to meet with defence counsel, establish a litigation plan, and confirm that billed work was related to the indemnified charges and in accordance with the litigation plan. The purpose of the Reviewer system was to:

- ◆ provide the accused with counsel to defend the charges in a responsible and competent manner;
- ◆ ensure a reasonable minimum expenditure of public money;
- ◆ preserve solicitor-client privilege; and
- ◆ facilitate public accountability.

The Reviewers owed the same duty of confidentiality and solicitor-client privilege to Mr. Basi and Mr. Virk that they would owe if they had been directly retained by Mr. Basi and Mr. Virk. Although Mr. Basi and Mr. Virk waived privilege over the records concerning their indemnities that government held, they did not waive privilege over the documents that the Reviewers held. As a result, we did not have the opportunity to review unredacted (complete) invoices from defence counsel or correspondence between the Reviewers and counsel regarding the eligibility of fees and disbursements. In addition, except for any copies contained in government’s files, we were not able to review correspondence between the Reviewers and defence counsel regarding approvals for new disbursements and changes to the Legal Representation Agreement, including new authorized legal staff and rates.

We were, therefore, unable to:

- ◆ assess the effectiveness of the Reviewer system;
- ◆ determine compliance with the terms of Mr. Basi and Mr. Virk’s indemnity agreements;
- ◆ evaluate whether the services provided complied with the terms and scope of the indemnity agreements, or if the advice was related only to the breach of trust charges as covered by the indemnity, and not to any charges against Mr. Basi for the Agricultural Land Reserve<sup>8</sup> and marijuana cultivation<sup>9</sup>;
- ◆ discuss with the Reviewers how these additional disbursements were approved in accordance with the terms of the agreement;
- ◆ determine why there were often delays in the review process;
- ◆ determine why certain amounts were not certified as payable; and
- ◆ determine why one Reviewer deducted a 10% holdback from the amount payable on a number of occasions.

8 On April 3, 2006, the Special Prosecutor laid four new charges of fraud and breach of trust against Mr. Basi for receiving \$50,000 from the developers of Sunriver Estates, along the Sooke River, in connection with an application to remove land from the Agricultural Land Reserve. As part of the plea agreement, Mr. Basi plead guilty to the charge of offering a benefit to Sunriver Estates.

9 On September 15, 2004, charges were laid against Mr. Basi, alleging he was involved in the cultivation of marijuana as the landlord of his Shawnigan Lake house where the RCMP found a marijuana grow operation. These charges were stayed on June 30, 2005.

## Holdbacks

Mr. Basi and Mr. Virk's indemnity agreements were the only ones where government established the discretion to hold back a percentage of the fees owing to counsel.

The purpose of the holdback was to create an incentive for defence counsel to avoid unnecessary work. If Mr. Basi and Mr. Virk were convicted, government would keep the holdback and defence counsel would have to collect any owed amounts directly from Mr. Basi and Mr. Virk.

Although government initially held back 25% of all fees approved by the Reviewer, these amounts were released in 2008. Legal Services Branch decided that while holdbacks were an appropriate mechanism for civil proceedings, they might not be appropriate for criminal proceedings, where they could create the appearance of undue government influence over defence strategy.

## DECISION TO AMEND INDEMNITIES

On October 5, 2010, Mr. Basi and Mr. Virk's lawyers informed Legal Services Branch that the Special Prosecutor had approached them with a plea deal. The lawyers said that, although they believed their clients would not be convicted at the end of the trial, the terms of the plea deal were potentially acceptable. The lawyers also said that the obligation for Mr. Basi and Mr. Virk to repay their defence costs, if convicted, was a barrier to the lawyers even approaching their clients with any plea offer. Defence counsel requested that the indemnities be amended to remove that impediment which would allow them to present to their clients the plea proposal which, if successful, would bring the proceedings to an early end.

Legal Services Branch considered the request from two perspectives: 1) how the significant cost to government of the trial proceedings compared with the relatively small amounts potentially recoverable from Mr. Basi and Mr. Virk, and only if they were convicted; and 2) how the potential obligation to repay was interfering with the Special Prosecutor's ability to bring the prosecution to an appropriate conclusion.

Government had spent \$6 million on the defence to that point, and the trial had just started. Only two of a possible 42 witnesses had been called. Legal Services Branch estimated that the defence would cost a further \$2 million if the trial ran its full course. At the time of the trial, it was costing government approximately \$15,000 for each day in trial for defence and prosecution counsel.

Another consideration was that because Mr. Basi and Mr. Virk's \$400,000 in assets would not begin to cover the costs of the proceedings to date, government would be obligated to pay the bulk of the costs whether the trial ended sooner or later.

Based on this analysis, Legal Services Branch recommended to the Deputy Attorney General and the Deputy Minister of Finance that government agree to release Mr. Basi and Mr. Virk from any potential liability to repay the costs of their defence as long as (following from the negotiations with the Special Prosecutor) they pleaded guilty and were convicted.

On October 8, 2010, the Deputy Minister of Finance, in consultation with the Deputy Attorney General, agreed to approve an amendment to the indemnity agreements.

The role of the Special Prosecutor, the reasons for and timing of the plea deal, and the nature of discussions between the Special Prosecutor and defence counsel were all matters outside of the scope of our audit.

Legal Services Branch then began negotiating the terms of the release with defence counsel – terms that were eventually documented in the two Agreements to Release.

There are many circumstances in which senior public servants exercise authority over significant financial transactions without the approval of Treasury Board or Cabinet. In the case of Mr. Basi and Mr. Virk, the amendment did not require approval by Treasury Board or by Cabinet.

The approval of the release was consistent with the authority required to grant the indemnities under section 72 of the *Financial Administration Act*. The authority of the Deputy Minister of Finance is very broad and there is no limit to the Deputy Minister's expenditure authority (i.e. the value of expenditures the position can approve). However, although the expense authority is unlimited, the ability to forgive a debt or obligation is limited. Section 18 of the *Financial Administration Act* requires Cabinet's approval to forgive an amount owing to government of \$100,000 or greater. If the indemnity agreements had not been amended before the repayment provisions came into effect, an obligation to pay the Province would have been established, which could only have been forgiven with the approval of Cabinet.

## The Agreements to Release

On October 14, 2010, the Assistant Deputy Attorney General of Legal Services Branch sent defence counsel a letter accompanied by a proposed form of the Agreement to Release. The letter stated that if Mr. Basi and Mr. Virk each pleaded guilty as they proposed, were convicted, met certain other administrative requirements, and signed the attached Agreement to Release, the Province would also sign the agreement. By doing so, this would amend the indemnity agreements to remove Mr. Basi's and Mr. Virk's potential obligation to repay their legal fees.

Although the Agreement to Release did not take the same form as other amendments we reviewed, it had the same effect – namely, resulting in a change to the terms of the agreement. The Agreement to Release referenced the existing indemnity agreement and was authorized by the Deputy Minister of Finance.

On October 20, 2010, the Deputy Minister of Finance signed the Agreements to Release, the last step required to conclude the changes that had been negotiated between Legal Services Branch and defence counsel over the preceding two weeks. Although this happened two days after Mr. Basi and Mr. Virk pled guilty, it did take effect before November 17, 2010: the date that the amounts paid under the indemnities would have become a debt, if the indemnity agreements had not been amended.<sup>10</sup>

## The Amendment's Separation from the Plea Deal

This release agreement was kept distinct and separate from Mr. Basi and Mr. Virk's negotiations and agreement with the Special Prosecutor. Legal Services Branch was concerned only with the administration of the special indemnities and we saw no evidence of communication or contact with the Special Prosecutor or his co-counsel.

The plea deal and a document known as the Agreed Statement of Facts entered into court were presumably negotiated between the Special Prosecutor and defence

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<sup>10</sup> Under the BC Criminal Rules of Court, either party to a proceeding can initiate an appeal within 30 days after the imposition of a sentence. The appeal period for Mr. Basi and Mr. Virk ended on November 17, 2010, exactly 30 days after they pled guilty.

counsel. The terms for amending the indemnity agreements to relieve Mr. Basi and Mr. Virk from any obligation to repay their legal costs were negotiated between Legal Services Branch and defence counsel, solely at the latter's request.

Legal Services Branch did not initiate and was in no way involved in discussions of a guilty plea to conclude proceedings. Rather, defence counsel approached Legal Services Branch to discuss the issue of Mr. Basi and Mr. Virk's potential liability to repay the indemnities.

We interviewed current and former public servants who had responsibility for granting, amending and administering these two indemnity agreements. We also reviewed records related to these two indemnity agreements at various branches of government. Based on our interviews and file reviews, we found no evidence of political involvement in the decision to amend the indemnities to release Mr. Basi and Mr. Virk from the obligation to repay the indemnity costs if they were found guilty. Our review also found evidence of public servants diligently keeping the decision to amend the indemnities separate and distinct from the plea negotiations with the Special Prosecutor that concluded the trial. The lawyers of the Legal Services Branch were very aware of their professional responsibility to keep the administration of indemnities completely separate from the prosecution.

## Impact of New Regulation

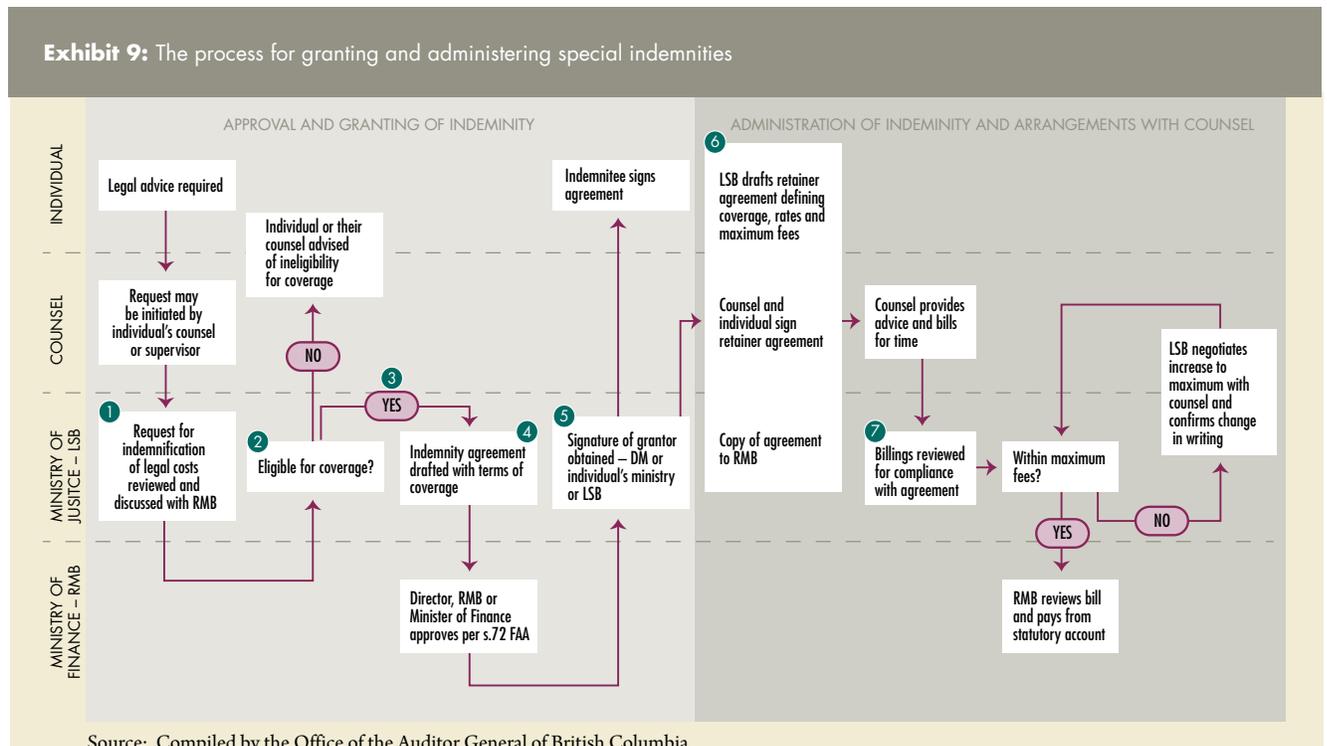
The *Excluded Employees (Legal Proceedings) Indemnity Regulation* introduced in March 2012 makes repayment of legal costs mandatory if an employee is convicted.

Public servants no longer have the authority to remove an obligation to repay by amending the terms of an indemnity agreement. Under the new regulation, once an obligation to repay is established (after any legal appeal process) it can now only be forgiven following the process in section 18 of the *Financial Administration Act*. This means that any amounts of more than \$100,000 can only be forgiven with the approval of Cabinet.

**THE PROCESS TO APPROVE** and administer any request for indemnification that was outside of existing policy involved the following steps:

1. Legal Services Branch (LSB) receives a request for government funding of legal advice from: an employee; an LSB lawyer on behalf of a ministry; a private lawyer who has already been retained by an individual; or a ministry on behalf of an employee.
2. LSB considers whether the individual is eligible for coverage by reference to Public Service Agency policy and the precedent established through other special indemnities.
3. LSB recommends, either in writing or in conversation with Risk Management Branch (RMB), that a special indemnity be granted to an individual.
4. LSB draws up an indemnity agreement that details that circumstances giving rise to the need for a special indemnity and defines the scope of coverage recommended. The unsigned agreement, often with a blank Legal Representation Agreement (LRA) attached, is sent to RMB for approval.
5. Once the indemnity is approved by the Director of RMB or the Minister of Finance, it is granted by the Ministry of Justice or a representative from the ministry or agency where the individual is or was employed, as evidenced by a signature, and then signed by the individual being indemnified.
6. LSB undertakes administration of the indemnity agreement and retains the private lawyer under a LRA.
7. LSB administers the LRA and all costs incurred under the indemnity are forwarded to the Ministry of Finance to be paid out of the Insurance and Risk Management Account, the special account managed by RMB.

**Exhibit 9:** The process for granting and administering special indemnities



Source: Compiled by the Office of the Auditor General of British Columbia

**Exhibit 10:** Costs of Concluded Special Indemnities

Legal Representation Costs Funded Under Special Indemnities

Fiscal Year	Category	Type of Proceeding	Total Amount
1995/96	Elected Official	Civil	\$234,079.18
1998/99	Elected Official	Criminal	\$1,421,916.04
1999/00	Public Servant	Criminal	\$661.79
1999/00	Elected Official	Civil	\$3,096.29
1999/00	Elected Official	Civil	\$0.00
1999/00	Elected Official	Civil	\$0.00
1999/00	Elected Official	Civil	\$15,652.71
1999/00	Elected Official	Civil	\$20,145.15
1999/00	Other (Officers of the Legislature, political appointees, contractors, etc.)*	Criminal	\$37,800.04
1999/00	4 Public Servants	Civil	\$59,854.19
1999/00	Public Servant	Public Inquiry	\$86,269.61
1999/00	Other (Officers of the Legislature, political appointees, contractors, etc.)	Criminal	\$0.00
1999/00	Other (Officers of the Legislature, political appointees, contractors, etc.)	Civil	\$0.00
1999/00	Other (Officers of the Legislature, political appointees, contractors, etc.)	Civil	\$0.00
1999/00	Other (Officers of the Legislature, political appointees, contractors, etc.)	Criminal	\$0.00
1999/00	Other (Officers of the Legislature, political appointees, contractors, etc.)	Civil	\$0.00
1999/00	Public Servant	Professional Body	\$14,962.68
2000/01	Public Servant	Public Inquiry	\$0.00
2000/01	Public Servant*	Criminal	\$319.20
2000/01	Public Servant	Civil	\$2,808.75
2000/01	Public Servant	Public Inquiry	\$3,929.64
2000/01	Public Servant	Public Inquiry	\$5,181.94
2000/01	Public Servant	Public Inquiry	\$8,270.91
2000/01	Elected Official	Civil	\$9,484.77
2000/01	2 Other (Officers of the Legislature, political appointees, contractors, etc.)	Public Inquiry	\$14,359.40
2000/01	Elected Official*	Civil	\$14,437.17
2000/01	Public Servant	Public Inquiry	\$39,905.71
2000/01	2 Public Servants	Public Inquiry	\$48,009.12

# APPENDIX D - COSTS OF CONCLUDED SPECIAL INDEMNITIES

Fiscal Year	Category	Type of Proceeding	Total Amount
2000/01	Public Servant	Public Inquiry	\$48,885.59
2000/01	Public Servant	Public Inquiry	\$53,752.90
2000/01	Elected Official*	Criminal	\$54,473.02
2000/01	Public Servant	Public Inquiry	\$64,216.36
2000/01	Public Servant	Public Inquiry	\$84,239.04
2000/01	Public Servant	Public Inquiry	\$170,528.48
2000/01	2 Other (Officers of the Legislature, political appointees, contractors, etc.)	Public Inquiry	\$279,052.38
2000/01	Elected Official	Conflict of Interest	\$8,154.29
2000/01	5 Public Servants	Criminal	\$0.00
2001/02	Public Servant	Civil	\$1,803.55
2001/02	Public Servant	Civil	\$3,026.34
2001/02	Elected Official	Conflict of Interest	\$4,260.18
2001/02	Elected Official	Civil	\$6,105.06
2001/02	Public Servant	Civil	\$8,203.52
2001/02	Public Servant	Civil	\$12,396.43
2001/02	Other (Officers of the Legislature, political appointees, contractors, etc.)	Civil	\$67,346.13
2001/02	Elected Official	Civil	\$69,137.58
2001/02	Public Servant	Professional Body	\$79,071.52
2001/02	Elected Official	Civil	\$92,363.58
2001/02	2 Public Servants	Criminal	\$1,712.75
2002/03	Public Servant	Government Review	\$1,855.61
2002/03	Elected Official*	Criminal	\$36,097.13
2002/03	4 Public Servants	Government Review	\$3,580.48
2002/03	Elected Official	Civil	\$0.00
2003/04	Public Servant*	Criminal	\$2,044.48
2003/04	Other (Officers of the Legislature, political appointees, contractors, etc.)*	Government Review	\$2,365.00
2003/04	Public Servant	Government Review	\$10,343.67
2004/05	Public Servant	Professional Body	\$5,884.37
2004/05	Other (Officers of the Legislature, political appointees, contractors, etc.)*	Criminal	\$2,945,672.09
2004/05	Other (Officers of the Legislature, political appointees, contractors, etc.)*	Criminal	\$3,236,932.95
2005/06	Public Servant	Government Review	\$718.65
2005/06	Public Servant*	Government Review	\$4,980.31
2005/06	Public Servant*	Government Review	\$6,609.49
2005/06	Public Servant*	Government Review	\$6,874.83
2005/06	Public Servant	Government Review	\$11,132.81
2005/06	2 Elected Officials	Civil	\$82,778.07

# APPENDIX D - COSTS OF CONCLUDED SPECIAL INDEMNITIES

Fiscal Year	Category	Type of Proceeding	Total Amount
2005/06	7 Public Servants	Civil	\$6,208.10
2006/07	Public Servant	Government Review	\$3,245.45
2006/07	Public Servant*	Government Review	\$3,363.02
2006/07	Public Servant	Professional Body	\$6,344.06
2007/08	Public Servant	Public Inquiry	\$5,369.25
2007/08	Public Servant*	Government Review	\$6,746.76
2007/08	Public Servant	Government Review	\$36,968.50
2007/08	Elected Official*	Criminal	\$94,413.91
2007/08	Other (Officers of the Legislature, political appointees, contractors, etc.)	Public Inquiry	\$144,683.91
2007/08	Public Servant	Criminal	\$6,868.48
2008/09	Public Servant*	Criminal	\$1,605.00
2008/09	Elected Official	Conflict of Interest	\$12,043.70
2008/09	Public Servant	Public Inquiry	\$30,015.27
2008/09	2 Public Servants*	Civil	\$44,977.45
2009/10	Elected Official*	Criminal	\$0.00
2009/10	Public Servant*	Professional Body	\$2,544.87
2009/10	Public Servant*	Criminal	\$7,787.60
2009/10	Public Servant*	Civil	\$9,073.75
2009/10	Public Servant*	Criminal	\$11,652.60
2009/10	Other (Officers of the Legislature, political appointees, contractors, etc.)*	Civil	\$11,899.10
2009/10	Other (Officers of the Legislature, political appointees, contractors, etc.)*	Civil	\$19,648.55
2009/10	Public Servant	Professional Body	\$19,722.32
2010/11	Other (Officers of the Legislature, political appointees, contractors, etc.)*	Civil	\$186,403.60

Other Expenses Funded Under Special Indemnities

2007/08	N/A	FOI & Disclosure Costs to government for criminal proceeding**	\$1,479,330.92
Total:			\$11,658,659.10

\$0 No recorded expenditure

\* Files examined as part of the audit

\*\* The cost to government in complying with court orders for disclosure of documents for the Basi Virk trial

Source: Compiled by the Office of the Auditor General of British Columbia and Legal Services Branch, Ministry of Justice



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