

# **British Columbia Public Service Indemnity Policy Review**

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**October 2011**

## **Introduction and Mandate**

In May 2011, I was asked by then-Attorney General, Barry Penner Q.C., to conduct a review of the policy of the Government of British Columbia concerning the granting of indemnities to cover the legal costs of BC public servants who are not covered by a collective agreement (“excluded employees”), or who are Order-in-Council appointees or members of the Executive Council (the Cabinet). Specifically, I was to “consider and answer these questions about the Policy:

- i. What is the objective of the Policy,
- ii. How does it work,
- iii. Who is indemnified,
- iv. Under what circumstances,
- v. Whether the Policy is fair and how it compares to other jurisdictions, and
- vi. What, if any, changes need to be made.”

In addition, I was presented with a list of “specific considerations” that I should contemplate when answering the questions posed to me. These considerations are a catalogue of relevant issues that have been canvassed over the last decade or so of policy discussion within the BC government. (For the mandate letter and complete terms of reference, see Appendix A).

I must emphasize at the outset that I was not asked to undertake, nor did I, a detailed case-by-case audit of the past practice of the Government of British Columbia in granting legal indemnities for public servants. Instead, I reviewed the process and content of policy

*\*This review was conducted pro bono in my personal capacity. No views expressed should be imputed to the University of British Columbia, where I serve as President and Vice-Chancellor.*

development in BC since the late 1990s, surveyed summaries of many of the cases in which special indemnities were granted since 1999, and conducted a comparative investigation of the policies covering legal indemnities for public servants in other Canadian and Commonwealth jurisdictions, as well as the policies of current and former BC crown corporations. (For Charts showing the various approaches to indemnification adopted by Canadian and select Commonwealth jurisdictions, as well as current and former BC crown corporations, see Appendix B). Currently, the Auditor General of British Columbia is conducting a performance audit of the practice of indemnifying individuals for legal costs in circumstances outside of existing indemnity policy. That audit will be largely retrospective and will consider the alignment of policy and practice, and seek to identify areas for improvement in effectiveness and efficiency. The present report is primarily prospective and will focus on recommendations for policy improvement, the fairness of process and transparency.

It must also be said that I was well aware in conducting this review that the concern to reconsider the indemnity policy was prompted in some considerable measure by public interest in the indemnities granted to Messrs. Basi and Virk in criminal proceedings against them. However, my mandate did not focus on those cases alone. Although I consider them, I do so only in the context of fifteen or so years of practice involving many other cases.

My inquiry was limited in some respects, and inevitably, by the availability of documentation. Although I was granted access to Cabinet documents on a confidential basis, names of the parties, and references to the billing and cost details of most cases were “redacted” (blacked out). I saw only total costs, not a breakdown of costs. I want to be absolutely clear that the reason for the redaction was to uphold third-party solicitor-client privilege. In other words, I did not see details of cases where public servants benefitting from an indemnity and their lawyers had communicated concerning bills and costs between themselves. Treating this information as confidential is supported by the decision of the Supreme Court of Canada in the *Maranda* case,<sup>1</sup> where it was held that detailed information about billing could well reveal substantive information about defences and will usually be privileged. It was also required under the indemnity agreements signed in these cases. The effect was to make it difficult to cross-reference cases from one list to another, so I cannot certify that I can properly categorize every case in

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<sup>1</sup> *Maranda v. Richer*, [2003] 3 S.C.R. 193, 2003 SCC 67.

which an indemnity was granted in the last decade. I can say that I have a clear global appreciation of the scope of indemnities granted and their total cost.

I want to thank the Ministry of Attorney General for its cooperation throughout my review. My mandate is clear that the review I was asked to undertake is “independent,” but I relied upon the Ministry for access to relevant documents. None of my requests for specific documents was refused. I could not have completed this report without the diligent research work, and sound analysis and advice of Ms Erin Shaw.

## **I. Context of the Review**

For much of the history of the common law, the Crown could not be sued. Therefore, litigants often sued crown servants in their personal capacity, and the Crown would provide indemnities to protect servants from the costs of actions in tort. In the twentieth century, the legal framework changed and, through legislation, the Crown was made vicariously liable for torts committed by its servants.<sup>2</sup> However, in most jurisdictions – including British Columbia – Crown servants, now usually called public servants, could still be sued personally for wrongs committed in the course of their employment. Therefore the practice was continued of indemnifying public servants to defend against claims in tort related to their employment. There are examples of such indemnification in BC from at least the early 1980s. Coverage was extended to actions in defamation in 1989.

### *A. Contemporary Legislative and Policy Framework*

Today in British Columbia public servants who are covered by a collective agreement will typically find their rights to indemnification included in that agreement. Such agreements are outside the scope of this review. Instead, I have been asked to focus on the policy framework applicable to “excluded employees” (those falling outside collective agreements), members of Cabinet<sup>3</sup> and Order-in-Council appointees.

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<sup>2</sup> In BC, this was not accomplished until 1974, through the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89.

<sup>3</sup> Cabinet members are covered in their capacity as members of the executive branch of government; their relevant function for the purposes of indemnification relates to the decisions they make in their executive capacity only. MLAs are not covered as they serve as members of the legislative branch only.

In cases that are not within the field of criminal law, there are two broad categories of indemnity coverage: under s. 73 of the Public Agency's *Terms and Conditions for Excluded Employees (PSA Terms and Conditions)* and under s. 72 of the *Financial Administration Act*.

Section 73 of the *PSA Terms and Conditions* provides:

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.<sup>4</sup>

Section 73 goes on to outline the circumstances in which an indemnity may be provided to commence or defend a lawsuit for defamation, including detailed criteria for approval. These provisions were justified on the basis that, like a civil suit, defamatory comments can be used to attack a public servant who has acted in good faith in the scope of his or her employment. The criteria for providing the indemnity were based on the BC Supreme Court decision in *Vogel*<sup>5</sup> and include: the need to rehabilitate the employee/appointee's usefulness to government; the need to restore or preserve the integrity of the office or position of employment; how likely it is that commencing a lawsuit for defamation will achieve either or both of these goals; and the need for general deterrence.

Individual employees are named in a small number of civil cases brought against government and, when they are, it is usually either because the plaintiff is self-represented, or he or she simply wants two separate opportunities to conduct pre-trial discovery. In the latter case, the practice is for the government to concede vicarious liability and agree to the extra discovery. This usually results in the plaintiff discontinuing the action against the individual public servant.<sup>6</sup> Indemnities are most commonly requested by public servants to cover the costs of actions in defamation where the public servant wants to commence the claim, but they are rarely

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<sup>4</sup> [http://www.bcpublicserviceagency.gov.bc.ca/policy/terms\\_conditions/Part\\_10.htm#73](http://www.bcpublicserviceagency.gov.bc.ca/policy/terms_conditions/Part_10.htm#73)

<sup>5</sup> *Vogel v. Canadian Broadcasting Corp.* [1982] 3 W.W.R. 97 (B.C.S.C.).

<sup>6</sup> Information provided in discussion with a representative of the Legal Services Branch, Ministry of Attorney General, 13 June 2011.

granted.<sup>7</sup> Indemnities may also be granted in non-criminal cases on a purely discretionary basis under s. 72 of the *Financial Administration Act*.

**72** (1) The government may, subject to this section, give an indemnity or guarantee the performance of an obligation.

(2) The power given by subsection (1) is in addition to any power conferred by any other Act.

(3) An indemnity, and a guarantee...must not be given under this section or under any other Act by or on behalf of the government except in compliance with the regulations of the Lieutenant Governor in Council. ...

(6) A regulation referred to in subsection (3) may do one or more of the following:

(a) designate persons by whom a guarantee or indemnity may be given on behalf of the government;

(b) specify circumstances in which, before a guarantee or indemnity is given, approval must be obtained from the Lieutenant Governor in Council, the Treasury Board, a minister or another person;

(c) require that in specified circumstances, the maximum amount of the liability in respect of which the Treasury Board, a minister or other person may approve a guarantee or indemnity is limited to a prescribed amount;

(d) place those constraints, conditions and limitations on the giving of guarantees and indemnities, and on the exercise of the power of approval referred to in paragraph (b) or (c) that are considered desirable. ...

(8) The Minister of Finance must, as soon as possible after the beginning of each fiscal year, lay before the Legislative Assembly a report respecting the guarantees and indemnities approved by the Lieutenant Governor in Council or the Treasury Board during the preceding fiscal year.<sup>8</sup>

In the early 1990s it was proposed that the same coverage offered to “excluded employees” should be available to members of the Cabinet, and this was accomplished in 1996 by way of special standing indemnities under s. 72 of the *Financial Administration Act*, which were last renewed in 2001. For all other excluded employees and Order-in-Council appointees, approval of indemnities has been delegated to the Executive Director of the Risk Management Branch, who exercises his discretion on the basis of an opinion from the Legal Services Branch of the Ministry of Attorney General. Despite the considerable work done over the last decade within

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<sup>7</sup> *Id.*

<sup>8</sup> R.S.B.C., 1996, c 138, at

[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96138\\_01#section72](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96138_01#section72)

the Ministry of Attorney General developing a regulatory framework as provided for in s. 72(6) of the *Financial Administration Act*, no detailed regulations have been issued. Nor has any policy framework been approved. Numerous revisions to draft policies, including proposed Cabinet submissions, were produced from 1998 through to 2011. Only two were actually brought to Cabinet and neither was ratified.

In the absence of generally applicable regulations, Legal Services officials have worked with the Risk Management Branch to respond to requests for indemnification that require the exercise of discretion. Using firmly established common law method, the officials charged with exercising discretion have justified their decisions by drawing out the principles present in existing cases, for example cases where coverage is mandated under s. 73 of the *Terms and Conditions for Excluded Employees*, and analogising those principles to new circumstances. The result is that the discretionary granting of indemnities under the section has been expanded to new types of legal proceedings on a case-by-case basis.

The types of legal proceedings covered by the special indemnity under s. 72 of the *Financial Administration Act* have expanded to include:

- i. complaints against public servants before professional and regulatory bodies;
- ii. circumstances where public servants are called to be witnesses in legal proceedings involving the government;
- iii. circumstances where public servants are called to be witnesses in inquiries;
- iv. prosecutions against public servants for regulatory offences; and
- v. cases where public servants are respondents in human rights proceedings.

In addition, beginning in the 1990s, indemnities in criminal cases have also been granted on a discretionary basis under s. 72 of the *Financial Administration Act*. It would appear that the first time an indemnity was approved in relation to a criminal proceeding was for then-Premier Glen Clark, although there had been previous prosecutions of leading BC political figures. As this was the first occasion on which coverage was requested in criminal matters, and was outside the normal practice, the initial coverage decision was made at the highest levels of the civil service.

An indemnity was provided for defence costs for both criminal charges and allegations under the *Conflict of Interest Act*.<sup>9</sup>

After the decision was taken to indemnify an accused in a criminal proceeding, work began in earnest within the Ministry of Attorney General to develop a draft policy for indemnities in criminal cases for approval by Cabinet. Over the course of the next few years, various iterations of draft policy were prepared under which indemnities, including indemnities in criminal prosecutions, would be made available to public servants acting in good faith and in the scope of employment.

In the meantime, the practice of providing indemnities in criminal cases initially adopted in the Clark case continued. To date, indemnities have been granted in BC criminal cases approximately a dozen times. Three of those cases involved private prosecutions in which no charges were laid. Another half dozen or so indemnities were granted in relation to criminal investigations where no charges were laid, including four or five cases involving government granting charity bingo licenses. There have been only a handful of criminal cases in which indemnities were granted and that have gone to trial.

In a recent case involving a former Assistant Deputy Minister of Health convicted of breach of trust, the Globe and Mail reported that the employee “asked government to pay his legal bills but ministry staff had decided not to advance funds in situations involving allegations of criminal activity until after the matter was concluded.”<sup>10</sup> Here we confront the central issue to be addressed if indemnities are to be granted in criminal proceedings: should the indemnity be granted only up to the moment of charging, extend throughout the process, or be dependent upon the result? I will return to this issue in Part III(B) of this report.

#### B. *The Scale and Cost of Indemnification in BC*

When considering the debate that surrounded the costs to the public purse of the indemnities granted in the cases of Basi and Virk, it is important to note that the total cost of indemnities granted from 1999 to 2011 under both s. 73 of the *PSA Terms and Conditions* and s. 72 of the *Financial Administration Act* is less than \$11.4 million. These indemnities cover approximately

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<sup>9</sup> R.S.B.C. 1996, c. 287.

<sup>10</sup> *Globe and Mail*, 5 July 2011. (Copy on file with author. Not available online).

95 separate cases.<sup>11</sup> The indemnity costs for the defence in the criminal cases that went to trial made up \$8.8 million of the total. For the remainder of the cases, the costs ranged from \$1,800 to \$200,000, with an average of roughly \$27,000. In recommending appropriate policy going forward, it is important not to define the entire policy around the exceptional cases, but rather to find ways to treat exceptions with particular care.

### C. *An Alternative to Indemnification in Criminal Cases*

For the public servants addressed in this report, the only way that the government can fund civil actions and defences, or any other civil, professional, regulatory or human rights proceedings, is under the provisions of s. 73 of the *PSA Terms and Conditions* or s. 72 of the *Financial Administration Act*. However, if indemnities are refused in criminal cases, public funding may still be available to government employees under court orders for state-funded counsel. These are so-called “Rowbotham orders.”

A Rowbotham application is one in which an accused in a criminal proceeding brings a demand for relief, invoking ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms (Charter)*, on the basis that he or she will be denied a fair trial because of a financial inability to retain counsel. The order was first created by the Ontario Court of Appeal in 1988:

... a trial judge confronted with an exceptional case where legal aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided.... [T]he finding of legal aid officials that an accused has the means to employ counsel is entitled to the greatest respect. Nevertheless, there may be rare circumstances in which legal aid is denied but the trial judge, after an examination of the means of the accused is satisfied that the accused, because of the length and complexity of the proceedings or for other reasons, cannot afford to retain counsel to extent necessary for a fair trial.<sup>12</sup>

As the practice has evolved since the Rowbotham case itself, Rowbotham applications are made by people who are ineligible for legal aid either because their incomes are too high or the type of case is not covered by the province’s legal aid plan. For those whose income is too high to qualify for legal aid, the argument is that the defence will cost so much that they will be

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<sup>11</sup> It was not possible for me to determine whether or not more than one indemnity decision has been made in a single case.

<sup>12</sup> *R. v. Rowbotham* (1988) 41 C.C.C. (3d) 1 at 69 (Ont. C.A.); 63 CR (3d) 113.

financially ruined and still run out of money before the case is finished. If a Rowbotham application is successful, the defence is funded by government.

Public servants charged with criminal offences are unlikely to be financially eligible for legal aid and so, depending on their personal wealth, may be able to gain access to Rowbotham funding. However, in the absence of any indemnification, government is considered the payor of last resort, which means that before being eligible for state appointed counsel, the applicant must expend all his or her personal resources. Government may agree to fund a case without an application going to court and can also enter into contribution agreements with Rowbotham applicants that, for example, require the accused person to pay a monthly amount toward the costs of the defence. In BC, if government appointed counsel is approved or ordered, the case will be managed by the Legal Services Society (LSS). LSS's "large case management program" (to which I will return in Part V(A) of this report) provides expert, consistent and accountable oversight of large cases.

It is important to recognize that the indemnification system is not the only route of access to public funding of the defence for public servants charged with criminal offences. In fact, in the absence of indemnification, in complex cases where costs are certain to escalate, it is very likely that a public servant without independent means would exhaust his or her resources and would become eligible to apply for a Rowbotham order. Denying an indemnity would not necessarily mean that the public is "off the hook" for expenses.

## **II. Purposes of Indemnification**

The current legislative and policy provisions in BC that relate to the granting of indemnities for the legal costs of public servants do not contain any express policy goals or objectives. In reviewing the indemnity policies of current and former BC crown corporations and of other Canadian and Commonwealth jurisdictions, the most comprehensive statement of purpose I found was in the policy of the Government of Canada. In setting the context for the federal government's policy, it is stated:

Providing legal assistance and indemnification to Crown servants is essential to the protection of the Crown's interest, the fair treatment of its servants, and the effective management of an organization. Crown servants may be subject to legal claims/actions despite the fact that they are acting in good faith, within the scope of their duties or in the

course of their employment. It is therefore necessary that they receive appropriate legal representation and be protected from personal liability as long as they are not acting against the interests of the Crown.<sup>13</sup>

The federal policy goes on to enumerate specific policy purposes, which track the contextual statement using somewhat different language. Those purposes are to: (1) protect Crown servants from personal financial losses or expenses incurred while they were acting within the scope of their duties or in the course of their employment, and were not acting against the interests of the Crown; (2) protect the Crown's interest and its potential or actual liability arising from the acts or omissions of its Crown servants; and (3) ensure continued and effective public service to Canadians. Analogous, but less detailed, descriptions of policy purpose can be found in the indemnity policies of the Commonwealth of Australia<sup>14</sup> and BCFerries.<sup>15</sup> Other policies provide even less explicit guidance as to their underlying purposes.

The purpose statements in these policies reflect two major objectives: serving the public interest in effective government, including protecting the Crown from liability; and protecting employees from personal loss. The purposes are actually intertwined, and it is useful to tease them out more precisely.

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<sup>13</sup> Canada. "Policy on Legal Assistance and Indemnities" at: <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13937>.

<sup>14</sup> "The general policy underlying the provision of assistance to employees for legal proceedings is the prospect of some benefit to the Commonwealth as a result of the protection of:

(a) its financial interests (in particular, the avoidance or limitation of the Commonwealth's vicarious liability), or

(b) its general interests (in particular, its interest to act properly as an employer in supporting employees who have acted reasonably and responsibly in circumstances where the Commonwealth may not be vicariously liable for their actions)." Commonwealth of Australia, Attorney General's Department, "Legal Services Directions 2005, Appendix E, "Assistance to Commonwealth Employees for Legal Proceedings," at:

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(339383A93E59A076831A75961C22D2A2\)~LegalServicesDirections2005\\_May2011.pdf/\\$file/LegalServicesDirections2005\\_May2011.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(339383A93E59A076831A75961C22D2A2)~LegalServicesDirections2005_May2011.pdf/$file/LegalServicesDirections2005_May2011.pdf) ; and [http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment\\_LegalServicesDirections2005?open&query=legal](http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment_LegalServicesDirections2005?open&query=legal)

<sup>15</sup> "PURPOSE: To encourage all Employees to perform their responsibilities in the course of their employment to the highest possible standard and in accordance with the policies and procedures established by the Company and the laws and regulations established by governmental and regulatory authorities. To provide Employees with an assured process for Company support if a claim is made or legal proceedings are commenced against an Employee as a result of an Employee carrying out his or her work duties for the Company." BCFerries, "Human Resources Policy HR9.0 [:] Indemnity of Employees" (1 March 2006) (Copy on file with author. Not available online).

Indemnities protect the Crown from vicarious liability by helping to ensure effective legal representation. If a public servant is granted an indemnity in civil matters, there may be conditions applied to require government involvement in the choice of legal counsel and in decisions concerning the carriage of the case. In addition, an indemnity can help motivate the full cooperation of the employee in the conduct of the legal proceeding. The Government of Canada's policy refers specifically to this goal in relation to providing an indemnification for legal fees for public servants' participation in inquiries and other similar proceedings.<sup>16</sup> In other words, indemnification opens up the possibility that government can directly protect its legal interests by supervising the way a case is argued substantively and by motivating the full cooperation of the public servant in question with legal and regulatory processes. In addition, the government may be able to reduce the financial burden of particularly complex cases through a role in appropriate oversight and monitoring of the costs of litigation (particularly where private counsel is involved). I will return to this point later, and will deal in Part III(B) of this report with the unique situation of criminal cases, where direct government oversight should not be encouraged.

Indemnities also contribute to an effective public service more generally by allowing public servants to carry out their duties without fear of bearing what could be a crushing personal financial burden, should they become embroiled in legal process. Public servants make important decisions that affect people's lives; concern about potential legal action should not be allowed to impair the proper exercise of their functions. No person is infallible and holding civil servants personally liable for mistakes or failures of judgment can have a chilling effect on both the ability of public servants to carry out their responsibilities effectively and of the government to attract high quality people into the public service. For these reasons it is in the Crown's interest and is fundamentally fair to protect public servants from personal financial loss through indemnities.

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<sup>16</sup> "The greater public interest is served by obtaining the full collaboration of Crown servants in testifying in legal proceedings including parliamentary proceedings, commissions of inquiry, inquests or other similar proceedings. This policy is intended to encourage such collaboration." Canada, note 13.

### III. Prior Conditions for Indemnification

Although the reasons justifying the granting of indemnities to public servants are compelling, indemnification is not an automatic entitlement. In all jurisdictions that I have reviewed where an indemnity policy and practice exists, there are conditions that must be met before a public servant can ask for and receive indemnification. The Government of Canada policy requires that public servants were “acting in good faith” and “within the scope of their duties or in the course of their employment” and that they were “not acting against the interests of the Crown.”<sup>17</sup> The Commonwealth of Australia policy requires that public servants “have acted reasonably and responsibly.”<sup>18</sup>

In Alberta, the requirement is that the public servant “acted honestly and in good faith with a view to the best interests of the public;”<sup>19</sup> in Saskatchewan, that the public servant acted “in good faith” meaning “honestly, openly and without malice or ulterior motive.”<sup>20</sup> The BCFerries policy requires, only implicitly, that to be indemnified employees must be acting “in the course of their employment.” Employees will only be indemnified if they are “not grossly negligent or reckless” and they cannot have “purposely” caused loss or damage.<sup>21</sup> BC Hydro will not assume liability to indemnify for “a fraudulent, deliberate, or reckless breach or default.”<sup>22</sup> In a few cases, the public servant or employee can only be indemnified if “conduct was carried out...without criminal intent” or when there were “reasonable grounds” to believe the “conduct was lawful.”<sup>23</sup>

In BC, under s. 73 of the *Terms and Conditions for Excluded Employees*, an indemnity can be granted where an excluded employee or Order-in-Council appointee has acted “within his or her office or course of employment and was in good faith.” It is important to remember that s. 73 indemnities apply only to civil lawsuits and defamation cases. For criminal cases and for all

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<sup>17</sup> Canada, *id.*

<sup>18</sup> Commonwealth of Australia, note 14.

<sup>19</sup> Alberta, Corporate Human Relations Directive, “Indemnity Protection,” at

<http://www.chr.alberta.ca/Practitioners/?file=directives/relations/indemn-prot-for-employees&cf=8>.

<sup>20</sup> Saskatchewan, Public Service Commission, “Human Resources Manual,” Section: PS 813, Employee Indemnity, at <http://www.psc.gov.sk.ca/Default.aspx?DN=3f42fb0b-5869-4f84-a50f-e5aba1ef56a4>.

<sup>21</sup> BCFerries, note 15.

<sup>22</sup> BC Hydro, “Employee Indemnity Policy” (Copy on file with author. Not available online.)

<sup>23</sup> Insurance Corporation of British Columbia, (Copy on file with author. Not available online.); BCFerries, note 15; Alberta, note 19.

other “special indemnities” listed above on page 6, including those granted to members of Cabinet, there are no explicit conditions currently in force. Section 72 (6)(d) of the *Financial Administration Act* provides that regulations may “place those constraints, conditions and limitations on the giving of guarantees and indemnities, and on the exercise of the power of approval...that are considered desirable.” As noted already, however, while there is a well-developed practice, no detailed regulations have ever been adopted under this section, and the decision to grant indemnities has been left to the discretion of the Executive Director of the Risk Management Branch, upon the legal advice of the Legal Services Branch of the Ministry of Attorney General. This statutory discretion cannot be overridden by elected officials.

In considering the approaches taken in BC and in other jurisdictions, I conclude that there are two distinct sets of policy considerations that come into play when considering the imposition of conditions for indemnification: one for criminal cases, and one for all other circumstances.

#### *A. Indemnification in Non-Criminal Matters*

For non-criminal matters, the conditions articulated in the Government of Canada’s policy have much to recommend them. Public servants should not expect indemnification unless they were acting “within the scope of their duties or in the course of their employment.” One must remember that the purpose of indemnification is to protect both the Crown and the public servant. If the public servant is acting entirely outside the terms of his or her job, then the Crown should not be vicariously liable and should have no reason to intervene through indemnification. If the public servant is acting within the scope of duty or employment, he or she still cannot expect indemnification if “acting against the interests of the Crown.” It would be illogical and contrary to the very purposes of indemnification for the Crown, in civil matters, to indemnify a person acting against the public interest. Finally, the requirement that the public servant act “in good faith” to justify indemnification is eminently sensible. A person should not expect to benefit from access to public resources if acting in bad faith; nor are government’s interests in ensuring a strong public service enhanced by indemnifying a public servant who is in bad faith. Of course, the difficulty is defining “good faith”.

It is not within the scope of this review to canvass the entirety of the common law and civil law traditions of Canada concerning the concept of good faith. As anyone who has ever delved into

the law will know, “good faith” is a foundational concept that finds application in a myriad of settings. I suspect that one would never be able to define the term precisely; it can only be understood in specific juridical contexts, and to find a reasonable meaning in each context inevitably requires an exercise of judgment. Although no attempt should be made in any policy or regulation to define “good faith” exhaustively, certain indicators could be provided, such as the ones set out in the Saskatchewan policy: good faith includes acting “honestly, openly and without malice or ulterior motive.”

### B. *Indemnification in Criminal Matters*

For situations where an indemnity is requested in criminal matters, the policy concerns are different and even weightier. There are no doubt circumstances where public servants, acting in good faith and in the scope of their employment, could be subject to personal financial losses and expenses as a result of criminal allegations, investigations and charges. A pertinent illustration would be a private prosecution brought against a Crown prosecutor for malicious prosecution arising from his or her good faith conduct of a case.<sup>24</sup> In this or other analogous circumstances, it would seem unfair to require the prosecutor to fund his or her own defence. It would also discourage outstanding people from taking up the role of Crown prosecutor, thereby undermining one of the policy justifications for indemnification, from the perspective of the public interest.

However, this example also shows that the usual policy purposes invoked to justify indemnification are not invariably relevant in criminal cases. The goal of protecting the Crown from liability by ensuring that employees cooperate in legal proceedings in which their conduct is at issue is not applicable. The defendant employee in a criminal case cannot be expected to cooperate with the government to protect its interests. He or she will be more concerned to avoid the stigma and sanction that goes with criminal liability. That is why the co-management model that can work in civil cases, where the government is responsible for choosing counsel and takes an active stance in litigation strategy, cannot work in criminal matters. Nor should government advance a policy based on protecting itself from liability at the cost of crimes going unpunished.

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<sup>24</sup> In BC, the Crown may take over private prosecutions if the prosecution is well founded, and can meet the charging standard applied in other cases.

Further complexity is added when one considers cases where a public servant is accused of not acting in good faith and where, because of the nature of the act or omission, criminal liability might result. Consider a case in which it was alleged that a Crown Counsel had accepted a bribe to suppress evidence in an organized crime case and charges had been laid by a special prosecutor under s. 120 of the *Criminal Code* of Canada. Or a case in which a senior official is charged with breach of trust under s. 122 of the *Criminal Code* because he has committed an act contrary to a duty imposed on him by law, and the act has produced a personal benefit. In such circumstances should indemnities be granted? The easy answer is to suggest that, just as in the case of civil actions or other proceedings, when it is clear that a public servant has not acted in good faith within the scope of his or her duties or in the course of employment, or has acted against the interests of the Crown, no indemnity should be offered.

As is often the case, however, the easy answer may not be the right one. The best way to reveal the fundamental problem is to shift optics: instead of thinking about the charges laid against the Crown prosecutor (accepting a bribe) or the senior official (breach of trust), imagine that the trial has ended and that each has been found not guilty. Given the opprobrium attached to criminal liability, there is even more justification for wanting to protect public servants from bearing the full financial consequences of criminal prosecution that has resulted in an acquittal. The interest of the government in protecting the reputations of Crown prosecutors and senior officials is great, as is the need to show fairness to all employees. Moreover, if such people are ruined financially by criminal prosecutions that have been flawed, malicious or simply unable to prove guilt, attracting people into the public service may become even harder.

Various Canadian and Commonwealth jurisdictions have attempted to address the complexity of indemnities in criminal cases. Such indemnities are explicitly provided for in many jurisdictions including Canada, Alberta, Saskatchewan, Quebec, the Commonwealth of Australia, and the Australian states of Queensland and Victoria.<sup>25</sup> Such indemnities may be available in other

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<sup>25</sup> Canada, note 13; Alberta, note 19; Saskatchewan, note 20; Quebec. (Copy on file with author. Not available online); Commonwealth of Australia, note 14; Queensland. “Guideline for the Grant of Indemnities and Legal Assistance to State Employees” at <http://www.psc.qld.gov.au/library/document/guideline/indemnities-and-legal-assistance-guideline.pdf>; Victoria. “Government policy and guidelines: indemnities and immunities 2008” at [http://www.dhs.vic.gov.au/\\_data/assets/pdf\\_file/0005/437153/government-policy-indemnities-and-immunities-executive-summary-06-2008.pdf](http://www.dhs.vic.gov.au/_data/assets/pdf_file/0005/437153/government-policy-indemnities-and-immunities-executive-summary-06-2008.pdf).

jurisdictions on a case by case basis, as in Nova Scotia and the United Kingdom.<sup>26</sup> Within BC, indemnities in criminal cases are explicitly available under the BCGEU's 14<sup>th</sup> Master Agreement and under policies established by BC Hydro, BCFerries and ICBC.<sup>27</sup> The jurisdictions I have examined have adopted three fundamentally different approaches in their treatment of indemnities for criminal matters.

Underlying some policies seems to be an assumption that the allegations of criminal misconduct are true and automatically take the employee's conduct outside the scope of employment. For example, although BC Hydro's policy covers liability for fines and penalties for crimes under federal criminal legislation, it goes on to say:

Crimes under the Criminal Code are unlikely to be covered by the indemnity since they would likely involve actions which are fraudulent, or in deliberate or reckless breach or default of employment, or voluntary community service work, obligations.<sup>28</sup>

This assumption of guilt is of course implicit in jurisdictions that do not provide any indemnity coverage in criminal cases, such as Manitoba and New Brunswick.<sup>29</sup>

Another group of jurisdictions adopts the contrary approach: in all circumstances an assumption of good faith operates in favour of the employee. In the criminal context, what this means is that a presumption of innocence is applied. For example, under the Government of Canada's policy, in assessing a request for indemnity there is a presumption that the employee has met the initial eligibility criteria unless there is information to the contrary.<sup>30</sup>

Although it is difficult to discern how the policies work on the ground, the discretionary practice in BC under s. 72 of the *Financial Administration Act* appears to be similar to that of Alberta and the Government of Canada. The descriptions of practice that I have received suggest that there is no assessment of the employee's conduct when an indemnity is requested in a criminal case. This is in contrast to non-criminal special indemnities where there is an assessment made about

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<sup>26</sup> Nova Scotia. Telephone conversation with Department of Justice official, June 2011; United Kingdom. Correspondence with Treasury Solicitor's Department official, 28 June 28 2011.

<sup>27</sup> British Columbia Government Employees Union, Fourteenth Master Agreement, s 32.5, <http://www.bcgeu.ca/files/FourteenthMasterAgreementFinal.pdf>; BC Hydro, note 22; BCFerries, note 15; ICBC, note 23.

<sup>28</sup> BC Hydro, *id.*

<sup>29</sup> Manitoba. "Conditions of Employment Regulation," at <http://www.gov.mb.ca/csc/regulations/civillia.html>; New Brunswick. "Provincial Administration Manual AD-3190" (Copy on file with author. Not available online).

<sup>30</sup> Canada, note 13.

whether there are known facts or evidence that the employee's conduct was in any way dishonest, malicious or otherwise in bad faith.

A third group of jurisdictions attempts to strike a balance between the first two approaches by requiring some consideration of the circumstances of the case before any indemnity is granted in a criminal case. In Queensland the stated policy requires that "in deciding whether to grant an indemnity in a criminal case the decision maker must consider the prospects of conviction."<sup>31</sup> Similarly, in Saskatchewan an investigation into whether the acts or omissions subject to criminal prosecution were carried out in good faith is conducted.<sup>32</sup> This approach is also reflected in comments from ICBC that current policy allows the exercise of discretion in deciding whether an individual acted in good faith or not, and without criminal intent, to qualify for indemnity coverage.<sup>33</sup>

This approach seems to have the virtue of tracking a middle ground that reduces the risk that a government could spend millions of dollars defending a public servant who turns out to be guilty, with little or no likelihood of recovering any of those costs. However, trying to mitigate that risk by requiring the government to assess the good faith of the public servant within a criminal context implies a preliminary determination on the merits of a case. This approach has serious pitfalls. In many criminal prosecutions, it is the very question whether the accused acted honestly and in good faith that is at issue. The same question cannot safely be considered in advance by the Crown, as employer, before the Court has made its decision on the evidence before it. Any inquiry or investigation by the government would run parallel to a criminal investigation. The public servant could not be required to provide any information and other employees with knowledge of the circumstances could also be witnesses in the criminal investigation. There are significant opportunities to damage the later prosecution by raising questions of process and evidentiary fairness. Even more importantly, a decision not to fund the defence in a particular case could also prejudice the public servant who is innocent until proven guilty. This puts a heavy onus on the government to proceed with extreme caution.

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<sup>31</sup> Queensland, note 25.

<sup>32</sup> Saskatchewan, note 20.

<sup>33</sup> Correspondence with a senior Government Relations and Policy Advisor, Corporate Relations Department, ICBC, 18 July 2011 (Copy on file with the author).

One final mechanism has also been contemplated in the various stages of policy development in BC over the last decade. It is designed to limit government's liability for funding criminal cases involving public servants without forcing government to engage in its own advance assessment of the merits of the case, fraught as that is with danger for the prosecution if it goes ahead and potential unfairness to the public servant in question. Policy could provide for an indemnity for legal costs in criminal cases only until charges are laid by the Crown. The justification for this approach is that the BC test for charge approval is that there is a substantial likelihood of conviction based on the evidence in the Report to Crown Counsel and that prosecution is in the public interest.<sup>34</sup> Crown prosecutors are agents of the Attorney General, who provides impartial and independent legal advice to government. This is a fundamental distinction between the role of the Attorney General and that of any other member of Cabinet. Until a charge is laid, the public servant would be given the benefit of the doubt and expenses would be paid. But once a charge is laid, an assessment has been undertaken on a demanding standard that there is strong evidence to support a conviction; that is what "substantial likelihood of conviction" must mean. Therefore, the public servant should no longer receive the benefit of the doubt. Under such a policy, if a public servant were ultimately found not guilty, he or she should be able to seek reimbursement of their legal costs.

Although the idea of linking the provision or withdrawing of an indemnity to the decision of the prosecution to charge seems at first blush like a "balance" between the interests of the public servant and the Crown, it really is not. Fundamentally, it still amounts to a prior determination of guilt that might have severe prejudicial consequences for the accused public servant. While the case proceeds, the public servant could be required to expend substantial resources, leading even to financial ruin. If the accused were ultimately acquitted, much damage would already have been done. Even from the perspective of the interests of the government, then, this approach should cause concern. Exposing public servants to severe risk, which could result in their financial ruin, is not a good way to engender the highest standards of performance or to attract and retain the best people.<sup>35</sup>

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<sup>34</sup> See British Columbia. "Crown Counsel Agreement, Charge Assessment Guidelines," at <http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1-ChargeAssessmentGuidelines-2Oct2009.pdf>.

<sup>35</sup> In making this recommendation, I want to be clear that I fully understand the *de jure* independence of the Attorney General in charging decisions in BC. This fundamental principle deserves constant reassertion.

There is a further risk in relying on Crown charge approval as the trigger for suspending an indemnity. It could actually come to influence the Crown's decision in the first place. Although indemnification should not be relevant to charging, knowing that a public servant will lose his or her coverage might prompt prosecutors who have even slight doubts about the strength of evidence to exercise too much caution and decide not to charge. While this result might be very positive from the perspective of a public servant, it could actually distort the charging process by bringing in an extraneous factor that should not weigh in the decision.

The fairer and more prudent course, and the only course that upholds the full integrity of the presumption of innocence which is fundamental not only to our legal process but to our liberties, is to create a specific policy regarding the indemnification of public servants in criminal matters. That policy should allow for indemnification throughout the entire criminal process, up to the determination of innocence or guilt. The only condition that should apply in criminal cases is that the impugned act or omission underlying the criminal charge should have taken place "within the scope of their duties or in the course of their employment" (to adopt the policy language of the Government of Canada). Even this condition must be interpreted broadly so as to avoid detailed prior determinations whether or not the public servant in question was actually "performing" tasks and obligations associated with work. Such determinations could raise many of the same problems associated with a determination of "good faith" in the criminal law context. What needs to be avoided is the indemnification of public servants in criminal cases that are not associated in any way with work. To give concrete examples, the underlying policy goals of indemnification would not be supported by a grant to a public servant charged with the circulation of child pornography, even if some of the evidence was found on his work computer. Similarly, criminal assault committed in the workplace should not be covered by an indemnity from the public purse.

Lest it be feared that the suggested policy approach pays inadequate attention to the important goal of trying to limit the financial risk of government in providing indemnification in complex criminal law matters, it is important to remember two things. First, as noted above, in complex cases involving people who are not independently wealthy, it is likely that a Rowbotham order

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Nonetheless, linking indemnification to the charging standard could give rise to an apprehension of unfairness, however unfounded, could lead to Charter challenges and could undermine the purposes of indemnification.

will be made. In other words, the public purse will pay in any event, but only after a public servant is financially ruined. This approach would be unfair in the case of an acquittal, and would certainly not uphold the government's own policy interest in attracting and retaining excellent public servants, or in motivating high standards of performance that are not unduly cautious.

Secondly, complex and expensive criminal cases in the context of public servant indemnification are rare. Roughly three-quarters of the total cost of all indemnifications paid out by the provincial treasury since 1999 was expended in only a handful of 95 cases. Public policy should be designed to be fair and appropriate for the vast majority of cases, not for outliers. That said, the government has every right to want to control the risk of high costs in complex cases. I will show in Part V(A) of this report that government already has a way to exercise supervision in a manner compatible with the *Charter*.

#### **IV. Discretion in the Decision to Grant Indemnities**

Policies from other jurisdictions reflect a variety of approaches to the exercise of discretion in the granting of indemnities. Many do not treat the issue explicitly. For example, in England and Wales there are no written policies regarding the decision making process that should be followed in granting indemnities to public servants.<sup>36</sup> Full discretion seems to be assumed. The same is true in New Zealand but only because until very recently it was assumed that public servants had statutory immunity from prosecution.<sup>37</sup> In the State of Victoria, some decisions are within the scope of departmental civil servants, but others outside the normal course of business are actually referred to Cabinet, where decisions will be discretionary.<sup>38</sup> Other jurisdictions establish an entitlement to an indemnity upon meeting prescribed conditions. For example, Saskatchewan's policy provides that "employees shall be eligible for assistance regarding legal services if...".<sup>39</sup> Canada's policy is less clear but in practice appears to be provided on the same basis: the indemnity is granted if the basic eligibility criteria are met.

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<sup>36</sup> United Kingdom. England and Wales. "Civil Service Management Code," 12.2, at <http://www.civilservice.gov.uk/about/resources/csmc/>.

<sup>37</sup> *Couch v. Attorney General* [2010] NZSC 27.

<sup>38</sup> Victoria, "Government policy and guidelines: indemnities and immunities 2008," at [http://www.dhs.vic.gov.au/\\_data/assets/pdf\\_file/0005/437153/government-policy-indemnities-and-immunities-executive-summary-06-2008.pdf](http://www.dhs.vic.gov.au/_data/assets/pdf_file/0005/437153/government-policy-indemnities-and-immunities-executive-summary-06-2008.pdf).

<sup>39</sup> Saskatchewan, note 20.

British Columbia's current policy, in s. 73 of the *PSA Terms and Conditions*, imposes a requirement that "the Ministry of Attorney General shall defend the lawsuit and the government shall indemnify" when a public servant "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." This means that once the basic tests of good faith and scope of employment are met, the public servant is entitled to be indemnified. While the same criteria are applied to non-criminal special indemnities under the *Financial Administration Act* (see the list above on page 6), even if the criteria are met, the decision whether or not to grant an indemnity is purely discretionary. The granting of criminal indemnities is similarly discretionary, but the good faith test is not applied.

For defamation there are specific criteria used to justify the granting of an indemnity, drawn from the BC Supreme Court decision in *Vogel*.<sup>40</sup> However, the criteria are quite open-ended and the decision whether or not to grant an indemnity is discretionary. Practice is to grant indemnities only rarely in defamation actions. All other indemnities – those in criminal cases or "special indemnities" to members of the Cabinet – are provided under the *Financial Administration Act*, and the decision is purely discretionary.

For all matters outside criminal law and defamation, I believe the preferred policy would be to establish the set of criteria that should be met, to make the granting of indemnities conditional upon meeting the criteria, and to effectively shape discretion. In other words, the current approach of s. 73 of the *PSA Terms and Conditions* has much to commend it and should also be applied to non-criminal indemnities currently granted under the *Financial Administration Act*. In any revisions to the *Financial Administration Act*, however, care should be taken to allow for some flexibility in the possible expansion of categories of non-criminal indemnification. It is not possible to foresee every case in which indemnification might be the best policy.

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<sup>40</sup> *Vogel v. Canadian Broadcasting Corp.*, note 5.

The approach I recommend, that establishes specific criteria and thereby shapes discretion, supports the underlying goals of indemnification, both from the perspective of the individual and the government, by providing predictability, a solid protective net for individual public servants and fairness. In turn this approach supports legitimate governmental goals of assuring public servants that they are valued, thereby promoting recruitment and retention, and encouraging public servants to fulfill the requirements of their jobs without fear of litigation. I do not see any reason that a similar approach should not be taken to members of Cabinet. They should be able to count on indemnification in all matters other than criminal law and defamation. This would require a shift in current policy. Because members of Cabinet are only covered by special standing indemnities under s. 72 of the *Financial Administration Act*, the granting of an indemnity in any case is purely discretionary. I believe that this approach could lead in many cases to an unnecessary and unhelpful politicization of the decision whether or not to indemnify a member of Cabinet. Even if the discretionary decision is not politically motivated, it may seem so from the perspective of the public.

For civil suits in defamation that public servants seek to launch, again I am persuaded that the current approach contained in s. 73 of the *PSA Terms and Conditions* is logical, given the overall purposes of indemnification. Various categories of public servant are subject to intense public scrutiny. This includes senior officials such as Deputy Ministers, as well as particular groups such as Crown prosecutors. They are quite likely to be targeted from time to time with remarks that are ill-considered, ill-judged and perhaps even defamatory. Public servants can also feel frustrated because they are usually not in a position to respond to unfair comments or accusations. This can prompt sensitivity, and even over-sensitivity.

There will be rare occasions when comments on the public record are so damaging that they must be challenged through an action in defamation. But the public funding of any such action can only be justified if the purposes of indemnification are met. These include protection of the public servant but also protection of the interests of government. Negative public commentary will rarely be so damaging to the public servant that it will fundamentally damage his or her ability to do the job. Nor will it unduly impair the operation of government. Considering the purposes that underlie indemnification as set out in Part II of this report, public funding of complaints in defamation should be rare and should remain a matter of discretion. This question

is distinct from the issue whether indemnification should be available to *defend against* an action in defamation. In such cases, the same approach should be adopted as in all civil actions. When public servants are acting in good faith and within the scope of their duties or in the course of their employment, they should be indemnified to defend their and the government's interests if sued in defamation.

The case to strongly limit indemnification for public servant plaintiffs in actions in defamation applies even more strongly to members of Cabinet. As political figures, all their pronouncements, actions and inactions are subject to public debate. Language can easily escalate. However, unlike public servants, Cabinet members can fight back in public. Unless extreme, verbal attacks are unlikely to seriously undermine the role of the Cabinet member, or to prevent the effective functioning of government. There is a further reason to limit the public funding of actions in defamation by Cabinet members. Experience from other jurisdictions – from Singapore to Sri Lanka to Kenya – shows that actions in defamation can be used to chill debate and to mute political opposition.<sup>41</sup> Happily, this silencing technique has not been a major part of our political traditions, though it has been employed in some settings,<sup>42</sup> and we should not create mechanisms that might tend to encourage it.

In the criminal law context, given the policy concerns that I have identified, it would follow that the discretion to grant or refuse indemnities to public servants defending against a criminal charge will be very limited. Essentially, the only question that the decision maker should address is whether or not the circumstances that led to the charge were within the scope of the public servant's duties or in the course of employment. The assessment of "good faith" must yield to the presumption of innocence.

## **V. Controlling Costs to the Public Purse**

In the large majority of cases, the costs of indemnification are modest, and the current system of co-management that applies to civil actions and defences, and in regulatory, professional or

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<sup>41</sup> See, e.g., Bonnie Docherty, "Defamation Law: Positive Jurisprudence" (2000) 13 Harv. Hum. Rts. J. 263; Cameron Sim, "The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law" (2011) 20:2 Pacific Rim Law & Policy Journal 319; Amnesty International, "Singapore defamation case threatens press freedom" (19 November 2009) online at <http://www.amnesty.org/en/news-and-updates/news/singapore-defamation-case-threatens-press-freedom-20091119>.

<sup>42</sup> John McLaren, "The Defamation Action and Municipal Politics" (1980) 29 Univ. N.B. L.J.123.

human rights cases, seems to be working. Typically, for indemnities in non-criminal cases, hourly rates have been negotiated with reference to the rates paid by the government on ad hoc retainers where government itself is a party, the justification being that the government pays the legal costs of its employees at the same rate it pays to defend itself. The top hourly rate is \$250, with occasional exceptions where a higher rate is paid. In these cases, government has conduct of the file and can exercise direct control over costs by providing instructions about how the case is to be managed. That is partly why the average indemnity cost over 95 cases since 1999 was in the neighbourhood of \$27,000. Although this is not a negligible sum, it is by no means out of line with the typical costs of litigation today.

As I have already noted, the real concern is with the potential for costs to escalate dramatically in criminal cases. In the current practice, indemnities are granted in such cases under the *Financial Administration Act*. Lawyers' billings are governed by a legal representation agreement negotiated through the Legal Services Branch of the Ministry of Attorney General, which sets out the lawyer's rate, a maximum billing amount and requirements for the regular submission of bills. Oversight of billings in most cases is minimal: bills are sent to the supervising government lawyer for review and approval, which is treated as relatively routine.

Historically, billing rates in criminal cases in which indemnities have been granted have also been set according to rates the government pays its own lawyers in civil cases. But complex criminal cases are different, and might require a different approach to costs. Because the Crown brings the prosecution, the public servant must be represented by independent counsel and government has few levers to control costs. Government has struggled with this issue in the context of the public funding of increasingly long and complex public inquiries and in cases such as Basi and Virk. Such inquiries and cases usually involve senior counsel, who can demand top rates.

Currently, where the costs involved are anticipated to be high (informally a threshold amount of \$100,000 is applied), independent review arrangements are set up. These typically require a detailed litigation plan, a more thorough assessment of monthly billings with reference to that plan, and a certificate from the independent reviewer stating the amount to be paid, which is final

and binding on all parties. However, this type of case management has been employed in very few cases. There are no clear or transparent rules about when it will be applied and how it will be undertaken. Nor does the public know when independent case management has been employed. The current process has not provided the public with reassurance about the prudent use of public funds.

In February, 2011 the BC Supreme Court released a decision in *R. v. Bacon*<sup>43</sup>, which included comments on hourly rates paid by the government in criminal cases. The case involved an application to make an order funding counsel that would set hourly rates payable to counsel of choice, and to determine the number of counsel each accused required for a fair trial within a reasonable time. The applicants argued that without higher hourly rates and larger defence teams, there was real likelihood their *Charter* rights would be prejudiced. The application was denied but, in an aside, the judge commented on counsel rates set by the Attorney General:

[65] The LSS has tried to reign in indiscriminate and prolific costs with case management practices and SCAP [*to be discussed in Part V(A) of this report*], but sadly, when the Attorney General is approached for “special fees,” and engages in negotiations with counsel who seek a richer deal, cost and common sense take a back seat. This is evidenced by the enormous legal fees paid in the past in the Air India, Pickton and Basi and Virk trials. The Attorney General has stated that a counsel rate of \$250 per hour is unsustainable, in an apparent move to reign in public spending on legal fees. There seems to be little political or public appetite to perpetuate the process used to determine fees and number of counsel as has occurred in the past. ...

[67] There is no rationale or reason for the Attorney General to negotiate behind the scenes higher “special” rates for so-called “mega” trials. If there is a need for an enhanced fee with more than a 15% premium to deal with so-called “mega” trials, that should be part of a published, transparent fee schedule, like the Ontario Big Case Management program, which publishes tariff rates and enhanced rates for complex criminal cases. This is especially critical considering the trend towards longer, more complicated, criminal trials involving criminal organizations and *Charter* challenges, as cautioned in the Code LeSage report.

[68] It is the lack of transparency in funding large criminal cases that lends to the criticism raised by counsel here; the criticism being 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.

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<sup>43</sup> [2011] BCSC 135, at <http://www.courts.gov.bc.ca/jdb-txt/SC/11/01/2011BCSC0135.htm>.

[69] The benefits of a published, transparent fee schedule, offered by the LSS, without recourse to negotiations, would eliminate counsel's criticism of arbitrariness and the appearance of preferential treatment to some counsel and some accused persons.

It is not clear that the judge had evidence before her about the rates of pay in the other cases to which she referred. However, this underlines rather than invalidates her concerns about transparency. In the absence of information about how lawyers are paid, speculation and distrust are engendered.

I conclude that it is not principled, wise nor cost effective for the Ministry of Attorney General to negotiate lawyer's fees on a case by case basis or be involved in case management in criminal cases. It is not principled because the government as prosecutor (the Crown) cannot properly be asked to "supervise" the litigation strategy – including what lawyers to use – of a defence team. This is true because of the apprehension of unfairness, even though the Attorney General is formally independent of government in matters of criminal prosecution. It is not wise because it is very difficult for effective controls to be put in place when any Ministry of Attorney General lawyer negotiating with a defence counsel will be well aware of his complicated position and will likely be deferential. The government lawyer will know that if he or she pushes hard on fees, a *Charter* challenge from the defence could result. It is not cost effective because the problems of principle and prudence already noted make negotiated agreements unlikely to rigorously limit the actions of defence counsel or their resultant billings. There is an alternative, and that is to ask the Legal Services Society to provide case management services for cases where criminal indemnities are likely to be particularly expensive. (See immediately below in Part V(A)).

#### *A. The Legal Services Society's Case Management Practice*

The Legal Services Society (LSS) is responsible for the provision of legal aid services in British Columbia. Therefore, it appropriately focuses its work on access to justice by the poor. However, it has already taken on management of the provision of legal services under Rowbotham orders under a Memorandum of Understanding with the Ministry of Attorney

General,<sup>44</sup> and has developed a large case management system that could work by analogy when indemnities are granted to public servants in criminal law matters. It has also taken on management of some cases for the federal Crown on a fee-for-service basis. Rates for legal aid and other cases now managed by LSS (including Rowbothams) have been evolving in response to cuts to legal aid, growing case costs and increasing pressure to pay higher hourly rates in large cases.

LSS has created an effective case management process for large cases, called the Strategic Case Assessment Program, or SCAP. The program was introduced in 2003 to deal with the growing number of lengthy criminal trials. It is designed to improve the predictability of costs in long trials, effectively allocate legal aid funding and provide adequate resources for representation in lengthy cases. The governing principle is one of risk management: the more expensive the case is likely to become, the more control, monitoring and accountability is imposed on the case.

In the SCAP process, for cases with projected fees and disbursements over \$50,000, counsel must provide a trial plan that sets out a general outline, with global hours and a preliminary assessment of the physical location where those hours will be logged. They must also provide more detailed short-term plans consistent with the overall trial plan. In these cases, plans and budgets are subject to periodic review and revision to ensure the budget remains current.

Lawyers' time sheets are reviewed to ensure continued adherence to the trial plan. The oversight is provided by the LSS manager who can seek advice from senior counsel from the private bar. However, all decisions are the responsibility of LSS. For cases where the projected costs are more than \$175,000, the LSS provides oversight, but the costs are paid directly by the Ministry of Attorney General.

In all cases managed by LSS under SCAP, whether the lawyer is appointed on a legal aid certificate or as a result of a Rowbotham application, hourly rates apply. The standard rate is \$92.29 for the most senior lawyer. Lawyers can apply for enhanced fees of \$125/hour as part of

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<sup>44</sup> <http://www.lss.bc.ca/assets/aboutUs/memorandumOfUnderstanding.pdf>.

the SCAP budget setting process if they are experienced in criminal cases (generally 12 years or more) and the case is complex. Detailed criteria are set out in LSS's Enhanced Fee Policy.<sup>45</sup>

In December, 2010 LSS introduced the "exceptional responsibility premium" to be paid in addition to any enhanced fees if Crown counsel on the case is being paid in "Recognition of Exceptional Responsibilities" under the Crown Counsel Agreement.<sup>46</sup> This Agreement applies to cases where there is risk involved and the workload is heavy enough to have an impact on counsel's quality of life. The top rate paid under this policy is \$143 per hour.

While not endorsing the adequacy of the existing rates, I commend their transparency and consistency and recommend that rates for counsel in indemnity cases be similarly transparent and consistent. There is a real question why the rates applied for Rowbotham and other publicly funded high cost cases should be different from those paid out of the public purse for the legal defence of public servants under indemnities (who may otherwise be eligible for Rowbotham funding). Again, without in any way endorsing the current rates paid by LSS on Rowbotham cases, I can see no principled justification for any significant disparity in rates.

As noted above, it makes sense to take advantage of LSS's expertise and credibility in large case management by requesting that they provide case management services in cases where criminal indemnities are likely to cost a great deal. This change in practice would necessitate additional resources for the LSS, likely in the form of a percentage fee-for-service. Given the unpredictability of the timing, number and cost of complex criminal cases, as well as the significant resource constraints under which LSS currently operates, the arrangement should be on a request, rather than a demand basis. This would allow the LSS to ensure that it has the capacity to take on the work involved in managing any given case.

If a given case arrives at a time when the LSS has no capacity to take on management, the government should revert to the practice of appointing an experienced and independent external manager. However, she or he should be required to apply an approach modeled directly on the SCAP system and should apply transparent rates of pay analogous to those available within the LSS framework.

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<sup>45</sup> <http://www.lss.bc.ca/assets/lawyers/enhancedFees.pdf>.

<sup>46</sup> <http://www.lss.bc.ca/assets/lawyers/noticesToCounsel/77ExceptionalPremium.pdf>.

## Conclusion: Summary Policy Recommendations

### 1. Purposes and principles underlying indemnities

**It is in the Crown's interest and is fundamentally fair to protect public servants from personal financial loss through indemnities.**

The purposes underlying indemnification of public servants are two-fold: serving the public interest in effective government, including protecting the Crown from liability; and protecting employees from personal loss. In civil matters, indemnification opens up the possibility that government can directly protect its legal interests by supervising the way a case is argued substantively and by motivating the full cooperation of the public servant in question with legal and regulatory processes. The government may also be able to reduce the financial burden of particularly complex cases through a role in appropriate oversight and monitoring of the costs of litigation. In criminal cases, it may not be possible to pursue these purposes. However, in all cases indemnities contribute to an effective public service by allowing public servants to carry out their duties without fear of bearing what could be a crushing personal financial burden, should they become embroiled in legal process. Moreover, public servants make important decisions that affect people's lives; concern about potential legal action should not be allowed to impair the proper exercise of their functions. For these reasons it is in the Crown's interest and is fundamentally fair to protect public servants from personal financial loss through indemnities.

### 2. Transparent and accessible policy

**Detailed policy or regulations setting out the criteria and process for granting indemnities should be publicly available.**

In the absence of Cabinet-approved policy or regulation, Ministry of Attorney General officials have worked diligently to respond to requests for indemnification that require the exercise of discretion. Using firmly established common law method, the officials charged with exercising discretion have justified their decisions by drawing out principles present in existing cases and analogising those principles to new circumstances. As far as I can tell from the documents to which I had access, the results to date have been principled, but there is a risk that policy will be made on the fly, and that political

considerations will weigh too heavily. It is time for an explicit policy to be adopted on indemnification of public servants in legal proceedings. As concerns s. 73 of the *PSA Terms and Conditions*, a policy statement could be issued. For indemnification under s. 72 (6) the *Financial Administration Act*, regulations are provided for, but have yet to be issued. If both a policy statement and regulations are produced, they should be fully coordinated.

3. Availability of non-criminal indemnities

**Indemnities should be available in a range of non-criminal cases.**

In principle, indemnities should be available to all public servants, Order-in-Council appointees and members of Cabinet when certain conditions are met, in all legal proceedings, including : (i) actions in tort; (ii) actions in defamation; (iii) criminal prosecutions; (iv) complaints against public servants before professional and regulatory bodies; (v) circumstances where public servants are called to be witnesses in legal proceedings involving the government; (vi) circumstances where public servants are called to be witnesses in inquiries; (vii) prosecutions against public servants for regulatory offences; and (viii) cases where public servants are respondents in human rights proceedings. In defining categories of indemnification for the future, some flexibility is needed. It is not possible to imagine every case in which indemnification might be appropriate. Special considerations attend indemnification in criminal matters and when a public servant or other official seeks to sue in defamation.

4. Conditions for non-criminal indemnities

**Indemnification is not an automatic entitlement. Conditions must be met before a public servant can ask for and receive indemnification.**

For all civil actions and for professional, regulatory and human rights proceedings, a survey of practice reveals that before indemnification is granted the decision maker should be satisfied that public servants were “acting in good faith” and “within the scope of their duties or in the course of their employment” and that they were “not acting against the interests of the Crown.” Because “good faith” is a notoriously complex term

with wide meanings in different contexts, it might be helpful to further specify that “good faith” includes acting “honestly, openly and without malice or ulterior motive.”

5. Discretion in the granting of non-criminal indemnities

**Non-criminal indemnities should be granted when specific criteria are met.**

As concerns the role of discretion in the awarding of indemnities, for all matters outside criminal law and defamation, the preferred policy is to establish the set of criteria that should be met, to make the granting of indemnities conditional upon meeting the criteria, and to effectively shape discretion. In other words, the current approach of s. 73 of the *PSA Terms and Conditions* has much to commend it, and should also be applied to non-criminal indemnities currently granted under the *Financial Administration Act*. It supports the underlying goals of indemnification, both from the perspective of the individual and the government by providing predictability, a solid protective net for individual public servants and fairness. In turn this supports legitimate governmental goals of assuring public servants that they are valued, thereby supporting recruitment and retention, and encouraging them to fulfill the requirements of their jobs without fear of litigation. I do not see any reason that a similar approach should not be taken to the range of other non-criminal indemnities now granted on a purely discretionary basis under the *Financial Administration Act*. Similarly, I see no reason why this approach should not apply to members of Cabinet. They should be able to count on indemnification in all matters other than criminal law and defamation, where specific conditions should apply.

6. Indemnities in defamation cases

**The approach to defamation in s. 73 of the PSA Terms and Conditions should continue.**

For civil suits in defamation that public servants seek to launch, the current approach contained in s. 73 of the *PSA Terms and Conditions* is logical, given the overall goals of indemnification. Various categories of public servant are subject to intense public scrutiny. They are quite likely to be targeted from time to time with remarks that are ill-considered, ill-judged and perhaps even defamatory. Public servants can also feel frustrated because they are usually not in a position to respond to unfair comments or

accusations. This can prompt sensitivity, and even over-sensitivity. There will be rare occasions when comments on the public record are so damaging that they must be challenged through an action in defamation. But the public funding of any such action can only be justified if the purposes of indemnification are met. These include protection of the public servant but also protection of the interests of government. Negative public commentary will rarely be so damaging to the public servant that it will fundamentally damage his or her ability to do the job. Nor will it unduly impair the operation of government. Public funding of complaints in defamation should be rare and should remain a matter of discretion. This question is distinct from the issue whether indemnification should be available to *defend against* an action in defamation. In such cases, the same approach should be adopted as in all civil actions. When public servants are acting in good faith and within the scope of their duties or in the course of their employment, they should be indemnified to defend their and the government's interests if sued in defamation.

The case to strongly limit indemnification for public servant plaintiffs in actions in defamation applies even more strongly to members of Cabinet. As political figures, all their pronouncements, actions and inactions are subject to heated public debate. However, unlike public servants, Cabinet members can fight back in public. Unless extreme, verbal attacks are unlikely to seriously undermine the role of the Cabinet member, or to prevent the effective functioning of government.

7. Criminal indemnities

**(a) A specific policy regarding the indemnification of public servants in criminal matters should be developed. That policy should allow for indemnification throughout the entire criminal process, up to the determination of innocence or guilt.**

For situations where an indemnity is requested in criminal matters, policy considerations regarding the possible imposition of conditions for approval are unique. Requiring the government to assess the good faith of the public servant within a criminal context implies a preliminary determination on the merits of a case. This approach has serious

pitfalls. In many criminal prosecutions, it is the very question whether the accused acted honestly and in good faith that is at issue. The same question cannot safely be considered in advance by the Crown, as employer, before the Court has made its decision on the evidence before it. One possible policy approach contemplates providing an indemnity for legal costs in criminal cases only until charges are laid by the Crown and allowing reimbursement if the public servant is acquitted. Although the idea of linking the provision or withdrawing of an indemnity to the decision of the prosecution to charge may seem at first blush like a “balancing” of private and public interests, it really is not. Fundamentally, it still amounts to a prior determination of guilt that might have severe prejudicial consequences for the accused public servant. Even from the perspective of the interests of the government, this approach should cause concern. Exposing public servants to severe risk, which could result in their financial ruin, is not a good way to engender the highest standards of performance or to attract and retain the best people. There is a further risk in relying on Crown charge approval as the trigger for suspending an indemnity. It could actually come to influence the Crown’s decision in the first place. Although indemnification should not be relevant to charging, knowing that a public servant will lose his or her coverage might prompt prosecutors who are even slightly doubtful about the strength of evidence to exercise too much caution and decide not to charge.

The fairer and more prudent course, and the only course that upholds the full integrity of the presumption of innocence which is fundamental not only to our legal process but to our liberties, is to create a specific policy regarding the indemnification of public servants in criminal matters. That policy should allow for indemnification throughout the entire criminal process, up to the determination of innocence or guilt.

**(b) Only one condition need be met before granting an indemnity in criminal matters. The public accused servant must have been acting within the scope of duties or in the course of employment.**

The only condition that should apply in criminal cases is that the impugned act or omission underlying the criminal charge should have taken place “within the scope of their duties or in the course of their employment.” Even this condition must be interpreted broadly so as to avoid detailed prior determinations whether or not the public servant in question was actually “performing” tasks and obligations associated with work. Such determinations could raise many of the same problems associated with a determination of “good faith” in the criminal law context. What needs to be avoided is the indemnification of public servants in criminal cases that are not associated in any way with work.

8. Discretion in the granting of criminal indemnities

**In the criminal law context the discretion to grant or refuse indemnities to public servants defending against a criminal charge should be very limited.**

Essentially, the only question that the decision maker should address is whether or not the circumstances that led to the charge were within the scope of the public servant’s duties or in the course of employment. The assessment of performance of duties in “good faith” must yield to the presumption of innocence.

9. Managing the cost of indemnification

**(a) Civil cases should continue to be managed as they are now. High cost criminal cases should be managed externally.**

In the large majority of cases, the costs of indemnification are modest, and the current system of co-management that applies to civil actions and defences, and in regulatory, professional or human rights cases, seems to be working. The current system also seems to work with respect to low cost criminal cases. In those cases government does not engage in active case management and so concerns about direct government involvement in criminal defence management are not relevant.

The real concern is with the potential for costs to escalate dramatically in complex criminal cases and the need to responsibly manage their draw on public funds. Historically, billing rates in criminal cases have been set according to rates the

government pays its own lawyers in civil cases. But complex criminal cases are different, and require a different approach to costs. Because the Crown brings the prosecution, the public servant must be represented by independent counsel and government has few levers to control costs. It is not principled, wise nor cost effective for the Ministry of Attorney General to negotiate directly on lawyer's fees or engage in case management in complex criminal cases. There is an alternative, and that is to use existing processes established by the Legal Services Society (LSS) to manage large cases.

The government should ask the LSS to apply their large case management program to cases with projected costs above a certain amount. A reasonable threshold would be when costs are projected to be more than \$175,000, as this threshold is already applied within the LSS system. Under the current MOU, government is responsible for paying directly for all cases above this amount. Indemnity cases fit into this category as they would be funded by the Ministry of Attorney General and not by the LSS. This change in practice would necessitate additional resources for the LSS, likely in the form of a percentage fee-for-service. Given the unpredictability of the timing, number and cost of complex criminal cases, as well as the significant resource constraints under which LSS currently operates, the arrangement should be on a request, rather than a demand, basis. This approach would allow the LSS to ensure that it has the capacity to take on the work involved in managing any given case.

If a given case arrives at a time when the LSS has no capacity to take on management, the Government should revert to the practice of appointing an experienced and independent external manager. However, she or he should be required to apply an approach modeled directly on the SCAP system and should apply transparent rates of pay analogous to those available within the LSS framework.

**(b) Fees should be transparent and consistent**

While in no way endorsing the adequacy of the existing LSS rates for large cases, I commend their transparency and consistency and recommend that rates for counsel in indemnity cases be similarly transparent and consistent. There is a real question about

why the rates applied for Rowbotham and other publicly funded high cost criminal cases should be different from those paid out of the public purse for the legal defence of public servants under indemnities (who may otherwise be eligible for Rowbotham funding). I can see no principled justification for any significant disparity in rates. In seeking greater consistency and transparency in legal costs, especially when there is a potential for very high costs in complex cases, a comprehensive approach is to be preferred, and one-off agreements should be avoided.

## APPENDIX A

### British Columbia Public Service Indemnity Policy Review Terms of Reference

#### Introduction

The present formal indemnity policy is set out in section 73 of the Public Service Agency's [Terms and Conditions for Excluded Employees](#) ("PSA Terms"), and relates to civil litigation (non-criminal) matters only.

In addition, indemnities in criminal and other matters have been provided case by case on an *ex gratia* basis through indemnities under [Financial Administration Act, section 72](#).

The indemnity policy applies to excluded employees, and appointees under the Public Service Act as well as to former excluded employees and appointees. It also applies to members of Executive Council and officers of the legislature in the same manner and to the same extent as excluded employees. It does not apply to bargaining unit employees, as they are covered by the terms of the applicable collective agreements. It also does not apply to Members of the Legislative Assembly (MLAs) in that capacity.

#### Purpose and Scope of Review

The Attorney General has requested an independent review of the provincial government's current policy and practice (the "Policy") regarding the indemnification of its excluded employees and others for legal expenses arising from the performance of their employment.

In summary, the purpose of the review is to consider and answer these questions about the Policy:

- What is the objective of the Policy?
- How does it work?
- Who is indemnified?
- Under what circumstances?
- Whether the Policy is fair and how it compares to other jurisdictions?
- What, if any, changes need to be made?

This review is to consider the rationale for the Policy, the history of the development of the Policy, how it has been applied in the past, and the need for indemnity arrangements from a public administration perspective.

The review should recommend the circumstances in which indemnity arrangements should be applied in respect of civil matters, and should separately consider an appropriate policy for criminal matters. Factors to be considered are further outlined below.

### **Specific considerations**

1. In non-criminal cases, the review should consider the various situations in which a public employee may be faced with a legal challenge arising in the performance of their employment. These include a public servant who becomes a defendant or plaintiff in a civil action (including in defamation actions), is a witness in legal proceedings involving the government, is subject to prosecution for a regulatory offence, is a respondent in professional body proceedings or in human rights proceedings. The review should provide guidelines to be consistently applied in any circumstance where coverage is appropriate.
2. In the criminal context, the review should consider whether there are circumstances in which it is appropriate for government, rather than the public servant, to bear the legal costs involved and if so, provide policy guidance regarding both the circumstances and the approach (for example, whether there should be an indemnity or reimbursement, and if indemnity, whether upon a guilty plea or conviction repayment should be required).
3. Where alternate means of legal expense coverage exist, they should be considered, as well as the possibility in criminal proceedings where a court may order public funding of defence costs (e.g. “Rowbotham” orders).
4. The review should consider the approaches taken by other public sector employers in BC, in other Canadian provinces, by the federal government, and in England, Australia and New Zealand, in order to provide “best practices” recommendations. The reviewer should also consult with the Legal Services Society of British Columbia about how they administer legal counsel retainers and manage costs.
5. For any circumstances that the review recommends coverage in some form, there should be guidelines, such as who should determine eligibility for coverage, what factors are appropriate or relevant (for example, the presumption of innocence in criminal cases) and what measures should be taken when arranging for and administering legal counsel retainers in order to better control costs, ensure appropriate review of billings, and protect solicitor-client privilege, confidentiality and privacy.
6. If the review contemplates limitations on legal counsel retainers, it should discuss whether a limitation or refusal of coverage may face judicial review. The review should also provide guidance regarding any conditions or requirements that should apply, such as repayment, appropriate security and termination of coverage.
7. The reviewer is at liberty to consult with any part of government, including the Legal Services Branch, the Public Service Agency, and the Risk Management Branch, to understand the evolution and application of the Policy, as well as the circumstances in which the Policy has been previously applied.

8. The final review recommendations should:
  - (a) consider the legal issues, criteria, and principles relating to indemnity coverage, the benefits and costs of providing such coverage, the consequences of not providing coverage, and the need to achieve an appropriate balance between the interests of taxpayers and public servants;
  - (b) if coverage in any form is recommended, provide guidelines and reasons for the recommended coverage;
  - (c) to the extent possible discuss the potential cost impacts of the recommended approach; and
  - (d) discuss the benefits, disadvantages, and considerations that arise under the various options for overseeing any indemnity or other coverage arrangements, including oversight by the Legal Services Branch, another branch of government, the Legal Services Society of B.C. or another outside agency.
9. The reviewer's report is to be submitted to the Attorney General on or before October 28, 2011 and will be made public within 30 days of being received by the Attorney General.
10. Although the reviewer will not receive any remuneration for conducting this review and preparing the report, the Ministry of Attorney General will arrange resources, including external legal counsel familiar with the Policy, and support services, to assist in locating and reviewing existing documents, and researching the policies of other jurisdictions and public agencies.

**APPENDIX B: INDEMNITY PROVISIONS  
CANADIAN JURISDICTIONS**

**Part 1: Canada, Alberta, Saskatchewan, Manitoba**

	<b>CANADA</b>	<b>ALBERTA</b>	<b>SASKATCHEWAN</b>	<b>MANITOBA</b>
<b>Authority</b>	<p>Policy on Legal Assistance and Indemnification</p> <p><a href="http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13937">http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13937</a></p>	<ul style="list-style-type: none"> <li>• Directive</li> <li>• Granted by Provincial Treasurer with approval of TB</li> <li>• Indemnity created by s. 2 OIC 668/92</li> </ul> <p>Terms and conditions in Appendix to the OIC</p> <p><a href="http://www.chr.alberta.ca/Practitioners/?file=directives/relations/indemn-prot-for-employees&amp;cf=8">http://www.chr.alberta.ca/Practitioners/?file=directives/relations/indemn-prot-for-employees&amp;cf=8</a></p>	<p>Policy – Human Resources Manual, PS 813</p> <p><a href="http://www.psc.gov.sk.ca/Default.aspx?DN=3f42fb0b-5869-4f84-a50f-e5aba1ef56a4">http://www.psc.gov.sk.ca/Default.aspx?DN=3f42fb0b-5869-4f84-a50f-e5aba1ef56a4</a></p>	<p>Conditions of Employment Regulation</p> <p><a href="http://www.gov.mb.ca/csc/regulations/civillia.html">http://www.gov.mb.ca/csc/regulations/civillia.html</a></p>
<b>Who is Eligible for Coverage</b>	<p>Crown Servants including:</p> <ul style="list-style-type: none"> <li>• departmental employees</li> <li>• OIC, TB or ministerial appointments</li> <li>• former or serving PM, LG GG, Minister, Deputy had and minister’s exempt staff</li> <li>• rep authorized in writing to act on behalf of serving PM, ministry or deputy</li> </ul> <p>In exceptional circumstances, may be coverage beyond basic criteria – reviewed by an advisory committee</p>	<ul style="list-style-type: none"> <li>• Employee and former employee</li> <li>• Member, former member executive council</li> <li>• Members of leg assembly</li> </ul> <p>Members or directors of provincial corporations, etc</p>	<p>Employees appointed under the Public Service Act. (The policy covers OIC appointees.)</p>	<p>Employees covered by the regulation</p>
<b>Types of Proceedings</b>	<ul style="list-style-type: none"> <li>• Civil claims – sued or threatened with suit, named or under threat of being named in a legal action</li> <li>• Criminal cases – charged or likely to</li> </ul>	<ul style="list-style-type: none"> <li>• Civil claims</li> <li>• Criminal cases</li> <li>• Administrative actions</li> </ul> <p>Proceedings enforceable by a monetary</p>	<ul style="list-style-type: none"> <li>• Charged</li> <li>• Interviewed by police or other authorities in circs that could lead to charges</li> </ul>	<p>Action or proceeding for an alleged tort</p> <p>On a case by case basis, the provisions have been very broadly interpreted and</p>

	CANADA	ALBERTA	SASKATCHEWAN	MANITOBA
	<ul style="list-style-type: none"> <li>be charged with an offence</li> <li>Faced with serious personal liability before any court, tribunal or other judicial body</li> <li>Parliamentary proceedings, commissions of inquiry, etc</li> <li>Or at discretion of Advisory Committee if one or more of 3 basic criteria not met (exceptional circumstances)</li> </ul>	penalty	<ul style="list-style-type: none"> <li>Sued or threatened with civil action</li> <li>Required to appear before a judicial investigative or other inquest or inquiry</li> </ul>	<p>have included such matters as disciplinary proceedings.</p> <p>To their knowledge, there has been no indemnification in a case of criminal proceedings.</p>
<b>Factors to Determine Coverage</b>	<ul style="list-style-type: none"> <li>Acted in good faith (honestly and without malice)</li> <li>Acted within the scope of duties or in course of employment (see def)</li> <li>Did not act against the interests of the Crown (see def)</li> </ul> <p>Operative presumption – crown servants are given benefit of the doubt in applying policy – actions of Crown servant adhere to basic eligibility criteria unless there is information to the contrary</p> <p>Criteria for inquiries, etc: in public interest to have Crown servant appear, matter concerns events acting in course of employment</p>	<ul style="list-style-type: none"> <li>Act undertaken in course of employment</li> <li>Acted honestly and in good faith</li> <li>With a view to the best interests of the public</li> </ul> <p>For criminal cases, administrative actions or proceedings enforceable by monetary penalty: reasonable grounds to believe conduct was lawful (see <i>Other</i> for more)</p>	<p>Good faith (honestly, openly, and without malice or ulterior motive)</p> <p>Within scope of employment</p>	In the performance of his/her duties

<b>Limitations</b>	<p>Not covered:</p> <ul style="list-style-type: none"> <li>• Internal investigation or internal administrative recourse mechanism not covered</li> <li>• Legal advice related to Public Servant Disclosure Protection Act</li> </ul> <p>Termination if established that crown servant acted dishonestly or not within scope of duties or course of employment and recovery action considered and initiated</p>	<ul style="list-style-type: none"> <li>• If new facts come to light, can withdraw indemnity</li> <li>• No standard clause for reimbursement if convicted</li> </ul>		
<b>Decision Making Process</b>	<p>Inform management; make a request for coverage to approval authority in their organization</p> <p>In criminal cases (or where conflict exists), request outside counsel with name of proposed counsel and fee schedule</p>	<ul style="list-style-type: none"> <li>• Contact HR department</li> <li>• HR contacts Alberta Risk Management</li> <li>• They will assist in contacting Alberta Justice</li> </ul>	<ul style="list-style-type: none"> <li>• Notify appropriate department official Criminal:</li> <li>• investigation to determine if the employees actions were carried out in good faith</li> <li>• if formal charges, investigation on hold (self incrimination issue) but other witnesses can be interviewed</li> <li>• if employee does not participate in investigation, assistance may be denied</li> </ul>	
<b>Billing</b>	<p>Legal feeds approved by DOJ, paralegal, necessary travel and expert witnesses</p> <p>Written authorization of private counsel to include limits of Crown commitment, total expenditures and the approved fee schedules, and of the requirement of reviewing accounts by DoJ</p>	<p>Must bill according to scheduled standard rates (capped at \$250/hour for most sr. counsel)</p> <p>Accounts reviewed to ensure billed rate and for reasonableness</p>	<ul style="list-style-type: none"> <li>• If eligible can hire own lawyer subject to fee arrangement being approved</li> <li>• An “up to” amount is authorized initially. If that proves to be inadequate, the issue will be revisited with detail on what more is needed and for what</li> <li>• All bills are reviewed for reasonableness.</li> </ul>	

<p><b>Other</b></p>	<p>Includes Context and Policy Statement sections</p> <p>The objectives of this policy are to:</p> <ul style="list-style-type: none"> <li>• protect Crown servants from personal financial losses or expenses incurred while they were acting within the scope of their duties or in the course of their employment, and were not acting against the interests of the Crown;</li> <li>• protect the Crown's interest and its potential or actual liability arising from the acts or omissions of its Crown servants; and</li> <li>• ensure continued and effective public service to Canadians</li> </ul>	<ul style="list-style-type: none"> <li>• Assumption of good faith works in favour of employee,</li> <li>• Like insurance, there must be reasonable grounds to deny coverage</li> <li>• If there is no 'smoking gun' likely to be covered.</li> <li>• If coverage denied and employee acquitted, can reapply.</li> </ul>	<p>Decisions appealable to Chair of the Public Services Commission, whose decision is final and binding</p>	
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**INDEMNITY PROVISIONS  
CANADIAN JURISDICTIONS**

**Part 2: Ontario, Quebec, Nova Scotia, New Brunswick**

	<b>Ontario</b>	<b>Quebec</b>	<b>Nova Scotia</b>	<b>New Brunswick</b>	<b>Northwest Territories</b>
<b>Authority</b>	Government self insurance policy  Collective Agreements	Convention collective des fonctionnaires 2010-2015	Human Resources Management Manual  <a href="http://www.gov.ns.ca/treasuryboard/manuals/PDF/500/51301.pdf">http://www.gov.ns.ca/treasuryboard/manuals/PDF/500/51301.pdf</a>	Administration Manual Compensation and Employee Benefits	Union of Northern Workers Collective Agreement  Excluded Employees Handbook/ Senior Managers Handbook <a href="http://www.hr.gov.nt.ca/policy/hrm/1100%20-%20Insurances/1109/default.htm">http://www.hr.gov.nt.ca/policy/hrm/1100%20-%20Insurances/1109/default.htm</a>
<b>Who is Eligible for Coverage</b>	No general policy  Self insurance – all employees  Collective agreements provided for corrections officers and OPP		Employees	Employees in Part I, II, and III of public service and anyone who is not an employee who performs services on behalf of province (but not a contractor)	Unionized employees  Excluded Employees / Senior Managers
<b>Types of Proceedings</b>	Commercial general liability insurance covers personal injury, property damage, bodily injury  OPP and OPSEU (Corrections) covers criminal	<ul style="list-style-type: none"> <li>• Civil</li> <li>• Criminal</li> <li>• When subpoenaed as witness in connection with an investigation or judicial or quasi-judicial inquiry in relation to act or omission within scope</li> </ul>	<ul style="list-style-type: none"> <li>• Negligence claims</li> <li>• Other types of claims are covered on an ad hoc basis with no official or unofficial policy</li> <li>• Have not been many (if any) criminal cases</li> </ul>	Where alleged employee is negligent or acted in a malicious fashion	Union: Defence and settlement of any actions, proceedings or prosecutions  Excluded: Civil action
<b>Factors to Determine Coverage</b>	Acts done in good faith In scope of employment	Act or omission within scope of employment	Acted within scope of employment	Acted in good faith Within scope of employment	Union: Arising out of acts performed or not performed in the course of and within scope of employment and duties in the public service

	Ontario	Quebec	Nova Scotia	New Brunswick	Northwest Territories
					<ul style="list-style-type: none"> <li>• Excluded: alleged misconduct committed in performance of duties</li> <li>• Not a gross disregard or neglect of duties</li> <li>• Given immediate notice to government</li> </ul>
<b>Limitations</b>	OPP and Corrections – employee charged but found not guilty of a criminal or other federal offence	Employee reimburses cost of civil defence if wilful misconduct or gross negligence, or act outside scope of employment (unless act done in good faith)		Employee must cooperate with defence, no admit liability, etc, claim is not covered by other insurance	
<b>Decision Making Process</b>		Request in writing to deputy minister			Notify deputy head, referred to Deputy Minister of Justice, DM Justice decides if employee entitled to Indemnification
<b>Billing</b>	Corrections and OPP CA: Retainer agreement between employee and counsel is subject to approval by employer and any account submitted is subject to review and approval by employer. If the employer does not approve the account, the employee may have the account assessed on a solicitor and client basis by a court assessment officer				

## BC Public Sector Employees Indemnity Provisions

	Relevant Documents/Authority	Types of Proceedings	Factors to Determine Coverage	Other Details
<b>Excluded Employees, OIC Appointments</b>	<ul style="list-style-type: none"> <li>PSA Terms and Conditions of Employment, s. 73</li> <li>Financial Administration Act, s. 72</li> <li>Guarantees and Indemnities Regulation</li> </ul>	<ul style="list-style-type: none"> <li>civil</li> <li>defamation</li> <li>human rights</li> <li>complaints to professional bodies</li> <li>witnesses in inquiries, etc</li> <li>criminal</li> </ul>	<ul style="list-style-type: none"> <li>course of employment or office</li> <li>in good faith</li> </ul>	
<b>BCGEU</b>	14 <sup>th</sup> master agreement <a href="http://www.bcgeu.ca/files/FourteenthMasterAgreementFinal.pdf">http://www.bcgeu.ca/files/FourteenthMasterAgreementFinal.pdf</a> (s. 32.5)	<ul style="list-style-type: none"> <li>Civil</li> <li>Criminal</li> <li>Defence of professional actions arising out of duties in proceeding before professional licensing body.</li> <li>At the option of the employer, employer may provide legal services in any proceeding or cover costs of counsel</li> </ul>	Civil: <ul style="list-style-type: none"> <li>except where there has been flagrant or wilful negligence</li> <li>Arising out of employment</li> </ul> Criminal: <ul style="list-style-type: none"> <li>criminal offence resulting directly from the proper performance of their duties; and</li> <li>found not guilty</li> </ul>	Criminal - will be <b>reimbursed</b> for reasonable legal fees
<b>ICBC</b>	Insurance Corporation Act, s. 30 - statutory immunity for ICBC employees against proceedings related to acts or omissions done in good faith under the Act.  Indemnity Policy	<ul style="list-style-type: none"> <li>Civil action</li> <li>Complaint to a professional body</li> <li>Proceedings or penalties brought under Utilities Commission Act</li> <li>Criminal – “current policy allows the exercise of discretion in deciding whether an individual acted in good faith or not and without criminal intent to qualify for indemnity</li> </ul>	<ul style="list-style-type: none"> <li>Employee acting in good faith</li> <li>Carrying out their duties</li> <li>No criminal intent</li> <li>Allegations of bad faith or that acts were outside scope of employment do not automatically disqualify the employee as long as ICBC satisfied in good faith and without criminal intent</li> </ul>	ICBC has sole right to choose and instruct counsel

	Relevant Documents/Authority	Types of Proceedings	Factors to Determine Coverage	Other Details
		coverage...indemnification is available, though it is not certain since each case is judged on its own merits.”		
<b>BC Hydro</b>	Excerpt provided: Indemnification of Employees	<p>Will indemnify from legal liability:</p> <ul style="list-style-type: none"> <li>• Civil liability</li> <li>• Liability for fines and penalties under provincial or federal statutory (regulatory) provisions</li> <li>• Liability for fines or penalties for crimes under federal criminal legislation such as Criminal Code</li> <li>• “Crimes under the Criminal Code are unlikely to be covered by the indemnity since they would likely involve actions which are fraudulent, or in deliberate or reckless breach or default of employment, or voluntary community service work, obligations.”</li> </ul>	<p>Arises either out of and in the employee’s normal course of employment with BC Hydro or from performing volunteer community service work for which BC Hydro is providing direct financial, public or equipment support</p> <p>Not covered (and can recover from the employee) if liability arose from conduct which was beyond the employee's, or former employee's, normal course of employment or normal scope of the volunteer community service covered by the policy, a fraudulent, deliberate, or reckless breach or default, or the indemnification for which is prohibited by applicable law.</p>	<p>BC Hydro may make such investigations, conduct such negotiations toward settlement and, with the written consent of employee or former employee, settle any such action as it deems expedient.</p> <p>In cases where an action is brought against an employee and the employee may be entitled to indemnification under the policy, BC Hydro may ask the employee to retain his or her own independent lawyer, at BC Hydro’s cost, or BC Hydro may elect to defend the action brought against the employee. If the employee retains his or her own lawyer, the employee must submit their counsel’s accounts to Legal Services. If Legal Services is of the view that such an account is excessive, Legal Services may require the employee to apply to the court to tax (reduce) the account.</p>

<b>BC Ferries</b>	Human Resources Policy	<p>Claims made or legal proceedings commenced arising from employee carrying out his or her work duties</p> <p>Criminal, civil, or administrative action</p>	<p>Acted honestly and in good faith, with a view to the best interests of the employee</p> <p>Not grossly negligent or reckless in carrying out work duties and did not purposefully cause loss or damage Had reasonable grounds to believe conduct was lawful</p>	
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8 November 2011

The Hon. Shirley Bond  
Attorney General of British Columbia  
Room 232  
Parliament Buildings  
Victoria, BC V8V 1X4

Dear Attorney General Bond:

Thank you for your letter of 7 November 2011, and for your positive reception of my report. In that letter, you asked me to address one further issue:

If government were to adopt your recommendation 7 (indemnities should be available where the employee is charged with an offence), should government policy require recovery of legal fees and disbursements paid for the defence of an indemnified employee who is then convicted or pleads guilty? If so, should the policy require government to seek recovery in all cases, without discretion? If the answer to this second question is no, what would the underlying policy rationale be for establishing a discretion to not seek recovery and who should exercise the discretion?

Here is my response.

In answering the questions that you have posed, I have reviewed the same set of indemnity policies from other jurisdictions and from current and former BC crown corporations that I examined for my initial report. I have also considered the underlying purposes for indemnification that were set out in that report.

The policies of some other jurisdictions that provide for indemnities in criminal cases are silent on the matter of reimbursement in the case of conviction. I cannot tell whether or not specific indemnity agreements in these jurisdictions address the issue because these agreements are generally confidential. These jurisdictions include Alberta, Saskatchewan and the Commonwealth of Australia. In other cases, policies provide explicitly for reimbursement upon conviction, for example Quebec and Queensland. Still others seem to have a slightly more flexible policy. These jurisdictions provide for reimbursement if the employee's conduct is "fraudulent, deliberate, or reckless" (BC Hydro) or if he or she acted dishonestly or didn't meet the initial criteria for coverage (Canada).

It is at least arguable in these latter cases there is actually an assumption of reimbursement in criminal cases because, in the case of Canada, one of the express purposes of the policy is to “protect Crown servants from personal financial losses or expenses incurred while they were acting within the scope of their duties or in the course of their employment, and were not acting against the interests of the Crown”. It is hard to see how public servants convicted of a criminal offence could have been acting “within the scope of their duties or in the course of their employment” and acting in the interests of the Crown. [I leave aside the complicated but highly particular case of members of security forces who have been ordered to undertake actions that are subsequently determined to be unlawful, but that were authorized under a formal chain of command]. In the case of BC Hydro, as I noted in my report, there is an explicit statement that indemnity is not likely to be granted in criminal cases in the first place:

Crimes under the Criminal Code are unlikely to be covered by the indemnity since they would likely involve actions which are fraudulent, or in deliberate or reckless breach or default of employment, or voluntary community service work, obligations.

In reviewing the approach taken by other jurisdictions and by current and former BC crown corporations, and in considering the fundamental purposes of indemnification of public servants in criminal cases, my view is that for criminal indemnities, conviction (including the case of a guilty plea) should trigger a claim for full reimbursement. Guilt in a criminal case necessarily means that the public servant was not acting within the scope of his or her duties or in the course of employment. No BC government employment or duty can require the commission of a criminal offence. No valid purpose articulated in my report would be served by allowing for indemnification in such cases, because there is no public interest in protecting the public servant from the full consequences (including financial consequences) of criminal liability. Nor is it personally unfair to public servants to expect that they bear the consequences of their criminal activity.

It follows that the requirement of reimbursement in the case of a criminal conviction should be mandatory and not subject to the exercise of discretion. Given this recommendation, I am not required to answer the last question you pose in your letter.

Again, I thank you for entrusting to me the task of considering a very interesting area of public policy and making recommendations to government.

Yours truly,

A handwritten signature in black ink, appearing to read 'Stephen J. Toope', written over a horizontal line.

Stephen J. Toope