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August 24, 2007

To: **Allan Seckel, Q.C.**
Deputy Attorney General

From: **George H. Copley, Q.C.**
Senior Counsel

Re: R. v. Basi, Virk and Basi

Instructions are required on whether or not to continue to assert the privilege, solicitor-client or Cabinet privilege, with respect to documents seized from offices of the Legislature and found by the Court to be "likely relevant".

The purpose of this Memorandum is to provide background information leading up to the need for instructions, to present a short summary of the principles governing the claim of privilege in this case, and to provide copies of the documents for which instructions are required.

Background

The following documents are attached to provide mostly self-explanatory background information:

1. E-mail message dated July 20, 2007, under the heading: Disclosure of Documents seized from the Legislature over which privilege has been claimed;
2. Memorandum to counsel with attached inventory from the Court dated July 16, 2007;
3. Letter to the Court dated July 20, 2007, without attachments (Protocols and Undertakings) dealing with release from undertakings;

4. Memorandum to counsel from the Court dated August 21, 2007, confirming the discussion at a pre-trial conference held on the same date.

Summary of Legal Principles

1. Cabinet Privilege

- (a) The test for public interest immunity (Cabinet privilege) used throughout these proceedings and incorporated in the Protocols is derived from s. 12 of the *Freedom of Information and Protection of Privacy Act*:

“Information in a document is subject to Cabinet privilege if that information would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees”.

- (b) Cabinet privilege in s. 12 FOIPPA extends beyond records of Cabinet discussions and includes any document prepared for submission to Cabinet from which it may be inferred what Cabinet discussed (*Aquasource Ltd. v. British Columbia (Information and Privacy Commission)*, [1998] B.C.J. No. 1927 (BCCA) at Q.L. para. 48).
- (c) Exceptions to Cabinet privilege set out in s. 12 FOIPPA apply here (i.e. background explanations or analysis if the decision has been made public or implemented or 5 years have passed since the decision was made or considered, etc.).
- (d) More generally, the test for whether Cabinet privilege can be successfully asserted in litigation is that set out in *Carey v. Ontario*, [1986] 2 S.C.R. 637, where the public interest in maintaining Cabinet confidentiality is weighed against the public interest in disclosure for the proper administration of justice.

2. Solicitor-Client Privilege

- (a) Solicitor-client privilege is to be maintained as near absolute as possible. - *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2007] 3 S.C.R. 209 at Q.L. para. 36.
- (b) Where disclosure of documents subject to solicitor-client privilege is sought in a criminal trial, the claim of privilege should only be overridden by the Court when the innocence at stake test is met, i.e. the solicitor-client communication in question is likely to raise a reasonable doubt as to the guilt of the accused – *R. v. McLure*, [2007] 1 S.C.R. 446 at Q.L. para. 60.

Documents for Which Instructions are Required

Please find attached copies of the documents found by the Court to be "likely relevant" and listed as such on the inventory provided by the Court attached to its July 16, 2007, Memorandum to counsel.

There are approximately 30 such documents split roughly equally between documents subject to a claim of solicitor-client privilege and to a claim of Cabinet privilege.

Once you have had an opportunity to review the documents, I propose that we meet for the purpose of seeking instructions on whether or not to continue to assert the claim of privilege with respect to each of the documents. I expect this will require a document by document review.

GEORGE H. COPLEY, Q.C.
Barrister and Solicitor

GHC:sf

Encls.

c.c. Nancy Reimer
John Tuck