



# Policy on Legal Assistance and Indemnification

## 1. Effective Date

1.1 This policy takes effect on September 1, 2008.

1.2 It replaces the [\*Policy on the Indemnification of and Legal Assistance for Crown Servants\*](#) of June 1, 2001.

## 2. Application

2.1 This policy applies to Crown servants as defined in section 4 of this policy, and to all departments as defined in section 2 of the [\*Financial Administration Act\*](#) (FAA) and to the other portions of the federal public administration named in Schedule IV of the FAA, unless otherwise excluded through specific acts, regulations, or orders in council, and to the Canadian Forces and the Royal Canadian Mounted Police.

## 3. Context

3.1 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.

3.2 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.

3.3 This policy is issued pursuant to section 7 of the [\*Financial Administration Act\*](#).

3.4 This policy reflects the values of the federal public service.

#### **4. Definitions**

4.1 For the purpose of this policy, the following definitions apply:

**Approval authority (autorité approuatrice)**

those designated to decide whether to approve or deny provision of legal assistance or indemnification to a Crown servant, i.e., the prime minister or his or her designated alternate, the minister, the Treasury Board, the Clerk of the Privy Council or the deputy head.

**Crown servant (fonctionnaire de l'État)**

- an individual employed (or formerly employed) in a department as defined in section 2 of the *Financial Administration Act* and to other portions of the federal public administration named in Schedule IV of the [\*Financial Administration Act\*](#), in the Canadian Forces and the Royal Canadian Mounted Police;
- an individual appointed (or formerly appointed) by the Governor in Council, or by the Treasury Board or by a minister; except for former and serving directors or officers of Crown Corporations;
- a former and serving prime minister, lieutenant-governor, governor general, minister, deputy head and ministers' exempt staff;
- a representative authorized in writing to act on behalf of a serving prime minister, minister or deputy head;
- an incoming Interchange Canada participant or former incoming Interchange Canada participant under the [\*Policy on People Management\*](#) and the [\*Directive on Interchange Canada\*](#); or
- an estate of an individual mentioned above.

**Deputy head (administrateur général)**

the deputy minister, the chief executive officer, or the person who occupies a position bearing some other title denoting the same level of responsibility.

**Indemnification (indemnisation)**

payment or reimbursement of amounts paid as a result of a judgment or a cost award against a Crown servant or as a result of a monetary settlement of a claim or an action made or brought against a Crown servant that is pre-approved by the approval authority based on the Department of Justice Canada's recommendation.

**Legal assistance (services juridiques)**

includes the cost of the services of the Department of Justice Canada, a Crown agent or private counsel, as well as paralegal services and includes necessary travel costs, incidental costs and the use of essential expert witnesses.

**Ministers' exempt staff (personnel exonéré)**

any individual appointed by a minister pursuant to section 128 of the [\*Public Service Employment Act\*](#), or under a contract for services to a minister with terms and conditions equivalent to those individuals appointed pursuant to section 128.

**Volunteer (bénévole)**

an individual who provides services directly to or on behalf of departments, without compensation or any other thing of value in lieu of compensation, other than reimbursement for expenses actually incurred. Such persons may serve as individuals or as members of groups such as non-profit organizations (as defined for purposes of the Income Tax Act).

## **5. Policy Statement**

### **5.1 Objective**

The objectives of this policy are 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;
- protect the Crown's interest and its potential or actual liability arising from the acts or omissions of its Crown servants; and
- ensure continued and effective public service to Canadians.

### **5.2 Expected results**

The expected results of this policy are that:

- Crown servants' and the Crown's interests are protected from potential or actual liability arising from the acts or omissions of Crown servants occurring while they were acting within the scope of their duties or in the course of their employment, and not acting against the interests of the Crown;
- Crown servants are protected against personal liability through fair and consistent policy application;
- the Crown and Crown servants are appropriately and promptly represented; and
- parliamentary proceedings, commissions of inquiry and inquests have the full collaboration of Crown servants.

## **6. Policy Requirements**

### **6.1 Approval authorities are responsible for:**

**6.1.1 Decision making:** Making decisions to approve or not approve requests for legal assistance and indemnification from Crown servants, within the scope of authority as set out in Appendix A. Decisions in respect to a request for legal assistance or indemnification are the responsibility of the approval authority for the organization where the incident giving rise to the request first arose.

**6.1.2 Timely response:** Ensuring timely responses to Crown servants who are requesting legal assistance or indemnification under this policy, and for ensuring that claims or threats of suits are acted upon quickly and that dispute resolution mechanisms are considered, as appropriate.

**6.1.3 Eligibility:** In making a decision on whether to approve a request for legal assistance or indemnification, ensuring that the Crown servant meets:

- the three basic eligibility criteria as described in 6.1.5; or
- the exceptional circumstances as described in 6.1.8; or
- the two qualifying criteria pertaining to parliamentary proceedings, commissions of inquiry, inquests or other similar proceedings as described in 6.1.9; and
- the requirements set out in Appendix B.

The approval authority may seek the advice of any officials who may have knowledge of the facts, as well as the legal advice of the Department of Justice Canada prior to making this decision. The decision should be made before legal counsel engages with the Crown servant to avoid a potential conflict situation, which would be detrimental to the interests of both the Crown servant and the Crown.

**6.1.4 Initial presumption:** In assessing the requests of Crown servants, presuming initially that they have met the basic eligibility criteria as described in 6.1.5 unless or until there is information to the contrary.

**6.1.5 Three basic eligibility criteria:** In considering Crown servants for legal assistance or indemnification, determining whether the Crown servant:

- acted in good faith;
- did not act against the interests of the Crown; and
- acted within the scope of their duties or course of employment with respect to the acts or omissions giving rise to the request.

**6.1.6 Legal assistance:** Deciding whether to approve legal assistance requests of Crown servants who meet the three basic eligibility criteria in the following situations:

- when they are sued or threatened with a suit;
- when they are charged or likely to be charged with an offence;
- when they are named in a legal action or under threat of being named in a legal action; or
- when they are faced with serious personal liability before any court, tribunal or other judicial body.

**6.1.7 Indemnification:** Providing indemnification when the Crown servant meets the three basic eligibility criteria as described in 6.1.5.

**6.1.7.1 Pre-approval of monetary settlement:** Deciding whether to pre-approve a monetary settlement of a claim or an action made or brought against a Crown servant based on the Department of Justice Canada's recommendation.

**6.1.7.2 No claim for recovery:** Where the Crown is liable as a result of incidents involving Crown servants, no claims to recover such liability are to be made by the Crown against the Crown servants provided that the applicable criteria were met.

**6.1.8 Exceptional circumstances:** Deciding whether to provide legal assistance or indemnification in the situations enumerated in 6.1.6 where the Crown servant does not meet one or more of the three basic eligibility criteria as set out in 6.1.5, provided the approval authority considers that it would be in the public interest to approve the request, after having consulted the Advisory Committee on Legal Assistance and Indemnification.

**6.1.9 Parliamentary proceedings, commissions of inquiry, inquests or other similar proceedings:** Deciding whether to approve requests for legal assistance where a Crown servant is requested or compelled to appear in connection with a parliamentary proceeding, a commission of inquiry, an inquest or other similar proceedings, provided two qualifying criteria are met:

- that it is in the public interest to have the Crown servant appear; and
- that the matter concerns events where the Crown servant was acting within the scope of his or her duties, or in the course of employment.

**6.1.10 Retroactive approval:** In circumstances where it was practically unreasonable for the Crown servant to obtain approval from the approval authority in advance, and where the need for legal services was immediately necessary to protect the Crown servant's interest, deciding whether to approve legal assistance retroactively, provided that the Crown servant has made the request as soon as possible thereafter.

**6.1.11 Ineligible requests:** Ensuring legal assistance or indemnification requests are not approved for the following matters:

- matters arising while the requestor was engaged under a contract for services, with the exception of ministers' exempt staff;
- an action or claim initiated by a Crown servant unless it forms part of a legitimate defence to a legal claim, action or charge for which legal assistance was approved under this policy;
- an internal investigation or an internal administrative recourse mechanism including grievances, staffing or disciplinary proceedings; and
- activities undertaken/carried out by a volunteer.

**6.1.12 Termination and recovery of legal assistance:** Ensuring legal assistance is terminated, if at any time during or after the proceedings it becomes clear that the Crown servant did not meet the basic eligibility criteria outlined in section 6.1.5 or did not continue to qualify under the exceptional circumstances described in section 6.1.8.

Where legal assistance was approved for a Crown servant who met the criteria under 6.1.5, but it was subsequently established that they acted dishonestly or it was determined that the Crown servant did not act within the scope of their duties or course of employment, ensure that recovery action is considered and initiated for an amount equal to the legal assistance provided or the indemnification paid, and this amount shall constitute a debt owing to the Crown.

**6.1.13 Reconsideration:** Ensuring prior decisions refusing a request for legal assistance or indemnification because the three basic eligibility criteria were not met are reconsidered where a court or tribunal has finally concluded its proceedings and new evidence or information has demonstrated that the basic eligibility criteria were met.

In such event, the approval authority seeks the advice of the Advisory Committee on Legal Assistance and Indemnification before confirming or changing the decisions.

**6.1.14 Responsibility for payment:** Ensuring that:

- any amounts paid pursuant to this policy are paid from the budget of the organization in which the person worked at the time the act or omission giving rise to the request first occurred. If the approval authority is from a different organization, then ensuring that the amount is referred over to such organization for payment. If that organization no longer exists, the successor to that organization is to handle the request and bear the financial costs. If no successor organization exists, then an application to the Clerk of the Privy Council may be made to determine from which budget the amounts are to be paid;
- for cases involving offences, payment by the Crown does not include any fines or costs of prosecution; and
- payment is not made until the request and supporting information is provided, and the approval authority has issued an authorization in writing approving the request.

**6.1.15 Education and preventing liability:** Ensuring Crown servants are aware that they:

- are to inform the appropriate official at the earliest opportunity whenever an incident takes place that may result in a claim against the Crown or Crown servant that may give rise to the need for legal assistance; and
- follow the request-making process as set out in Appendix B of this policy.

**6.1.16 Private counsel:** In cases where there is a conflict of interest between the Crown and the Crown servant, or when the servant is charged with an offence, deciding whether to authorize payments for private legal assistance after consulting the Department of Justice Canada with respect to the appropriateness of engaging such private counsel. Such consultation shall include the name of the proposed private counsel as well as the private counsel's proposed fee schedule. If it is determined that this source of assistance is appropriate and private legal assistance is authorized, then the approval authority shall provide written authorization to the Crown servant including the selection of private counsel, the limits of the Crown's commitment, in terms of both total expenditures and the approved fee schedules, and of the requirement for reviewing accounts by the Department of Justice Canada.

## **6.2 Monitoring and Reporting Requirements**

### **6.2.1 Within organizations**

The approval authority is responsible for ensuring that records are maintained for the amounts of:

- claims or settlements paid;
- territorial, provincial and federal court awards paid by the Crown;
- legal costs and related expenses paid under this policy; and
- numbers of requests refused.

The approval authority will ensure an annual analysis of the trends in requests and decisions made under this policy is undertaken to address any identified risk areas.

### **6.2.2 Government-wide**

The Office of the Chief Human Resources Officer (OCHRO) will review the policy and its effectiveness at the five-year mark of implementation. Where substantiated by risk analysis, the OCHRO will ensure an evaluation is conducted.

### **6.2.3 By organizations**

Where there is evidence of non-compliance or inconsistent application of the policy in any organization, OCHRO may request and shall be provided with additional or more frequent reporting on the use of the policy. This information and its analysis may be included in the Management Accountability Framework (MAF) process.

This section does not apply with respect to the Office of the Auditor General, the Office of the Privacy Commissioner, the Office of the Information Commissioner, the Office of the Chief Electoral Officer, the Office of the Commissioner of Lobbying, the Office of the Commissioner of Official Languages and the Office of the Public Sector Integrity Commissioner. The deputy heads of these organizations are solely responsible for monitoring and ensuring compliance with this policy within their organizations, as well as for responding to cases of non-compliance in accordance with any Treasury Board instruments that address the management of compliance.

## **7. Consequences**

7.1 Over and above costs identified in policy requirement 6.1.14, responsible organizations will be required to pay from their budgets any costs associated with errors or inappropriate application of the terms of this policy.

7.2 Consequences of non-compliance with this policy may also include any measures allowed by the *Financial Administration Act* that the Treasury Board may determine as appropriate.

## **8. Roles and Responsibilities of Other Government Organizations**

### **8.1 The Office of the Chief Human Resources Officer is responsible for:**

- providing advice and guidance to organizations on the interpretation of the policy;
- establishing an Advisory Committee on Legal Assistance and Indemnification, made up of selected senior managers, which will provide advice and recommendations to the approval authority in complex situations when required or requested to do so; and
- selecting the members of the Advisory Committee on Legal Assistance and Indemnification, coordinating the committee and chairing its meetings.

### **8.2 The Department of Justice Canada is responsible for:**

- providing legal advice to approval authorities and their organizations;
- providing litigation services to the Crown and to the Crown servants approved for assistance under this policy, including the conduct of the litigation, either through a Department of Justice counsel or an external counsel retained as an agent of the Attorney General, with the Minister of Justice having ultimate responsibility for selecting and instructing the agent;
- ensuring, in cases where two or more Crown servants are sued in the same action, that the same counsel is to conduct the Crown servants' defence in the absence of a conflict of interest;
- treating, to the greatest extent possible and consistent with counsel's obligations to protect the interest of the Crown, all communications with the Crown servant in confidence in any claim or proceeding for which the Attorney General of Canada has the authority under this policy to select and instruct counsel. The Crown will not use any information so disclosed in confidence by the Crown servant in any disciplinary or civil action against the servant;
- when at any time during a proceeding a conflict arises for a Department of Justice counsel or an agent of the Attorney General representing the Crown servant, the Attorney General could instruct such counsel to discontinue so acting. In such situations, the approval authority may authorize the engagement of private legal assistance in accordance with the terms of this policy;
- reviewing fees and disbursements proposed to be charged by private counsel to ensure they are within the limits established; and
- making recommendations in regard to a monetary settlement of a claim or an action made or brought against a Crown servant.

## **9. References**

### **9.1 Other relevant legislation**

- [Financial Administration Act](#)
- [Crown Liability and Proceedings Act](#)

### **9.2 Related policies/publications**

- [Policy on Financial Management](#)
- [Policies and Guidelines for Ministers' Offices](#)
- [Directive on the Management of Procurement](#)
- [Directive on Interchange Canada](#)
- [Policy on People Management](#)
- [Travel Directive](#)
- [Special Travel Authorities](#)
- [Values and Ethics Code for the Public Service](#)

## **10. Enquiries**

For questions regarding this policy, please contact [TBS Public Enquiries](#).

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**Appendix A - Approval Authorities and Scope of Approval for Legal Assistance and Indemnification**

Requestor	Approval Required From	Limits of Legal Assistance and Indemnification
<b>A) Prime Minister</b>		
• Current • Former	Clerk of the Privy Council Clerk of the Privy Council	no limit no limit
<b>B) Governor General Lieutenant-Governor Clerk of the Privy Council Minister</b>		
• Current • Former	Prime Minister (or designated alternate) Clerk of the Privy Council	no limit no limit
<b>C) Deputy Heads</b>		
• Current • Former	Clerk of the Privy Council Clerk of the Privy Council	no limit no limit
<b>D) Ministers' Exempt Staff</b>		
• Current • Former	Minister Clerk of the Privy Council	no limit no limit
<b>E) All other Crown Servants not mentioned above<sup>(1)</sup></b>		
• Both Current and Former	Deputy Head	<ul style="list-style-type: none"> <li>Indemnification—no limit</li> <li>Legal assistance provided by Department of Justice—no limit</li> <li>Legal assistance provided by private counsel—up to a limit of \$50,000</li> </ul>
• Both Current and Former	Minister	<ul style="list-style-type: none"> <li>Legal assistance provided by private counsel—over \$50,000</li> </ul>
<b>F) For Crown servants in (E) above that fall under 6.1.8 of this policy (exceptional circumstances)</b>		
• Both Current and Former	Deputy Head	<ul style="list-style-type: none"> <li>Indemnification—up to \$50,000</li> <li>Legal assistance provided by Department of Justice—no limits</li> <li>Legal assistance provided by private counsel—up to a limit of \$50,000</li> </ul>
• Both Current and Former	Treasury Board*	<ul style="list-style-type: none"> <li>Indemnification—over \$50,000—no limit</li> <li>Legal assistance provided by Department of Justice—no limit</li> <li>Legal assistance provided by private counsel—over \$50,000</li> </ul>

\*Where Treasury Board approval is required, the responsibility for preparation of all documentation related to a submission rests with the organization where the act or omission giving rise to the request first occurred. If that organization has ceased to exist, then the responsibility rests with its successor organization.

**Notes on Chart**

- All limits specified in this chart include all related costs (such as travel costs incurred in accordance with the *Travel Directive* and the *Special Travel Authorities*).
- The approval limits set out in this chart represent an accumulative total of legal assistance or indemnification costs for a single proceeding irrespective of the number of requests.

## **Appendix B – Requests by Crown Servants**

### **Process**

In order to be considered for legal assistance and indemnification, a Crown servant is required to:

1. inform the appropriate official (normally the Crown servant's manager or supervisor) of the matter at the earliest reasonable opportunity after the servant becomes aware of a possible or actual suit, action or charge as a result of any alleged act or omission within the scope of the Crown servant's duties or within their course of employment, so that the official has the opportunity to assist or guide the servant;
2. be willing to authorize as early as possible the Department of Justice Canada to represent the Crown servant;
3. submit a request to the approval authority in the organization in which the act or omission giving rise to the request first arose. The request should include how he or she meets the applicable criteria and should specify if the request is for legal assistance, indemnification or both. If the Crown servant's request exceeds deputy heads' approval limits listed in Appendix A and requires authority of the Minister or the Treasury Board, the request is to nonetheless first be made to the Crown servant's own deputy head (as applicable);
4. where requesting to be represented by private counsel, state the reasons for such request and provide the name and proposed fee schedule of the preferred counsel;
5. refrain from retaining private counsel until the appropriate approval authority has approved the request. A Crown servant who instructs counsel to begin work without the requisite approval may be personally responsible for payment of the resulting legal fees, costs and judgment;
6. make a factual report to organizational management of the incident leading to the request for legal assistance or indemnification; and
7. upon request by the requester's organization, authorize the Attorney General, or such other person as may be designated by the Attorney General, to defend his or her action, claim or charge using the required authorization form set out at the end of this appendix.

Failure of a Crown servant to meet the above requirements may result in denial of legal assistance and indemnification and result in personal liability. An acquittal in offence cases, or dismissal of a civil suit, does not automatically entitle the servant to reimbursement of expenses that have been previously denied.

For each subsequent stage of the judicial process, including appeals, or for any significant change in the circumstances related to the case, a new request for payment of legal assistance and indemnification is to be made and assessed in accordance with the considerations set out in this policy.

## **Requirement for prior approval of requests**

Crown servants who instruct counsel to begin work on a subsequent stage of the process without proper prior approval may not receive approval for legal assistance or indemnification for the resulting expenses.

### **Authorization Forms**

I, (name), of the (city/town/township), of (name of city) in the (province/territory) of (name of province/territory) hereby authorize the Attorney General of Canada, or such other person as may be designated by the Attorney General, or a delegate thereof, to defend me in,

**(describe the nature of the action and the name of the court, tribunal, inquiry or other)**

and to take such actions and conduct such proceedings as the Attorney General may consider necessary to defend such action on my behalf and to protect the interests of the Crown.

I have been provided with a copy of the Treasury Board *Policy on Legal Assistance and Indemnification*. I have read and understood the policy. If at any time during or after the proceedings it becomes apparent that I did not act in accordance with the eligibility criteria outlined in the policy, the approval authority may terminate legal assistance and may initiate recovery action for an amount equal to the legal assistance provided or the indemnification paid, which shall constitute a debt owing to the Crown.

Should any judgment or decision result in an award of costs to me, I hereby authorize and direct the payment of any such amounts directly to the Crown.

DATED at (location), this (date) day of (month), A.D., (year).

### **To be added to the above if there are multiple defendants**

I expressly waive solicitor-client privilege in favour of the Crown and the following co-defendant(s) who is/are also represented by the Attorney General of Canada, (**insert name(s)**), and I agree to a mutual sharing of material information with the Crown (and between these co-defendants). I understand, however, that counsel representing me will treat all communications between us in confidence to the extent possible consistent with counsel's obligation to protect the interests of the Crown. Where information provided by me in confidence is disclosed in the interests of the Crown, it is subject to the condition that it shall not be used by the Crown in any disciplinary or civil action against me.

I have been informed, and I understand, that I have the right to terminate this retainer at any time and to retain and instruct private counsel at my own expense. I have further been informed, and I understand, that should a conflict arise between my interests and those of the Crown (or any of the co-defendant(s) named above) at any time during this litigation, it will be necessary for me to retain private counsel. I am aware, in that event, that I may apply for approval to retain private counsel at public expense under the Treasury Board *Policy on Legal Assistance and Indemnification*.

### **Footnotes**

#### **Footnote fn1**

With respect to the Office of the Auditor General, the Office of the Privacy Commissioner, the Office of the Information Commissioner, the Office of the Chief Electoral Officer, the Office of the Commissioner of Lobbying, the Office of the Commissioner of Official Languages and the Office of the Public Sector Integrity Commissioner, this approval authority shall be exercised by the deputy head of the organization.